Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

UNITED TEXAS TRANSMISSION COMPANY
(now known as MidCon Texas Pipeline Corp.),

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS
and JEFFERSON COUNTY (TEXAS)
DRAINAGE DISTRICT NO. 6,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When Congress has conditioned its approval of and appropriation of funds for a flood control project upon a requirement that the project's "local sponsor" acquire all lands and easements and make all necessary utility relocations, may the U.S. Army Corps of Engineers, invoking conditions found in pipeline permits issued pursuant to § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), nonetheless require pipeline owners to relocate their pipelines without invoking eminent domain authority? *See Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979)

2. When a flood control project's local sponsor fails to acquire the necessary property and make the necessary utility relocations it has undertaken to acquire and/or perform, may the Corps, in lieu of resorting to a statutory condemnation proceeding, utilize conditions found in pipeline permits issued pursuant to § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) to require pipeline owners to relocate pipelines both within and outside the geographical areas subject to such permits? *See Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979)

3. By holding that the Corps' permit powers under § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) confer authority upon the Corps in fast lands outside the "permitted area" and the area subject to the federal navigational servitude, has the Fifth Circuit extended such powers beyond their lawful reach?

QUESTIONS PRESENTED – Continued

4. By holding that the Corps could rely upon permit conditions to demand relocations of sections of pipelines not within the permitted area in order to facilitate the construction of a flood control project having no navigational purpose , has the Fifth Circuit interpreted such conditions consistently with this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987)?

STATEMENT PURSUANT TO SUP. CT. R. 29.1

This Petition for Writ of Certiorari is filed on behalf of a corporation, United Texas Transmission Co. ("UTTCO"), now known as MidCon Texas Pipeline Corp. UTTCO is a wholly owned subsidiary of MidCon Corp., which in turn is a wholly owned subsidiary of Occidental Petroleum Corporation.

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner United Texas Transmission Company ("UTTCO") prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 7 F.3d 436 (5th Cir. 1993). The case was decided and the opinion released on November 18, 1993. The opinion is reproduced in its entirety at Appendix,

pp. 16-41. UTTCO filed a timely motion for rehearing, which was denied by written order of the Fifth Circuit on January 5, 1994. The order overruling the motion for rehearing is reproduced in its entirety at Appendix, p. 1.

The Opinion of the United States District Court for the Eastern District of Texas, Beaumont Division (affirmed by the Court of Appeals for the Fifth Circuit) is reported at 772 F.Supp. 952 (E.D. Texas, 1991) and is reproduced in its entirety at Appendix, pp. 42-48.

The Findings of Fact and Conclusions of Law reached by the United States Army Corps of Engineers, Galveston (Texas) District are also included in the Appendix. These findings and conclusions, entitled a "Statement of Findings", are reproduced in their entirety at Appendix, pp. 49-75.

JURISDICTION

The Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. § 1254.

STATUTES AND RULES INVOLVED

33 U.S.C § 702b (ch 569, § 2, 45 Stat. 535, May 15, 1928, entitled "Local Contribution for Flood Control Work"), provides as follows:

> It is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately $292,000,000, heretofore [before May 15, 1928] made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the

> extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

33 U.S.C. § 701c (ch 688, § 3, 49 Stat. 1571, June 22, 1936; ch 877, § 4, 50 Stat. 877, Aug. 28, 1937), which is reproduced in its entirety at Appendix, pp. 76-78, provides, in pertinent part:

> That hereafter [after June 22, 1936] no money appropriated under authority of this act shall be expended on the construction of any project until States, political subdivisions thereof, or other responsible local agencies have given assurances satisfactory to the Secretary of War [Secretary of the Army] that they will [provide] without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project . . .

Title II (entitled "FLOOD CONTROL"), § 202 of the Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (Oct. 27, 1965), provides as follows:

> Section 3 of the Act approved June 22, 1936 (Public Law Numbered 738, Seventy-Fourth Congress), as amended by section 2 of the Act approved June 28, 1938 (Public Law Numbered 761, Seventy-Fifth Congress), shall apply to all works authorized in this title except that for any channel improvement or channel rectification project, provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law, the authorization for any flood control project authorized by this Act requiring local cooperation shall expire five years from the date on

> which local interests are notified in writing by the Department of the Army of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of the Army that the required cooperation will by furnished.

Title II (entitled "FLOOD CONTROL") § 204 of the Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (Oct. 27, 1965), provides with reference to the Taylors Bayou project, that:

> The project for flood protection on Taylors Bayou, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers, as modified by the Secretary of the Army, in House Document Numbered 206, Eighty-Ninth Congress, of an estimated cost of $5,004,000.

Report of the Acting Chief of Engineers, House Document No. 206, Eighty-Ninth Congress, to which reference is made in 79 Stat. 1073, P.L. 89-298, is reproduced in its entirety at Appendix, pp. 79-85.

Letter of Transmittal, Secretary of the Army, House Document No. 206, Eighty-Ninth Congress, to which reference is made in 79 Stat. 1073, P.L. 89-298, is reproduced in its entirety at Appendix, pp. 86-88.

33 U.S.C. § 593 (ch 49, § 9, 40 Stat. 267, Aug 8, 1917), provides as follows:

> Whenever any State, or any reclamation, flood control or drainage district, or other public agency created by any State, shall undertake to secure any land or easement therein, needed in connection with a work of river and harbor improvement duly authorized by Congress, for the purpose of conveying the same to the United States free of cost, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of War [Secretary of the Army] may, in his discretion, cause proceedings to be instituted in the name

> of the United States for the acquirement by condemnation of said land or easement, and it shall be the duty of the Attorney General of the United States to institute and conduct such proceedings upon the request of the Secretary of War [Secretary of the Army]: Provided, That all expenses of said proceedings and any award that may be ma.e thereunder shall be paid by such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to secure which payment the Secretary of War [Secretary of the Army] may require such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to execute a proper bond in such amount as he may deem necessary before said proceedings are commenced.

33 U.S.C. § 594 (ch 155, § 5, 40 Stat. 911, July 18, 1918), provides as follows:

> Whenever the Secretary of War [Secretary of the Army], in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights of way needed for a work of river and harbor improvements duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: Provided, That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and

the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that such compensation may be promptly ascertained and paid.

STATEMENT OF THE CASE

OVERVIEW

In Congressional appropriations for federally assisted flood control projects, no principle has been more firmly established than that of the requirement of *local contribution.*[1] Guided by this principle, virtually all Congressional acts approving the expenditure of federal funds for local flood control projects have mandated that the project's local sponsor acquire all lands, easements and rights-of-way and make all utility relocations necessary for the completion of the project. In the rare situations in which an exception to the requirement of local contribution has been made, the exception has been conferred only by virtue of legislation that so provides. (See n.1, supra, and 33 U.S.C. § 702b). In the absence of such an enactment, Congress does not appropriate funds for the acquisition of property or relocation of utilities, because it is the local sponsor's duty to obtain such property and make the necessary relocations. 33 U.S.C. § 701c.

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[1] Even as early as 1928, this principle (also known as "local cooperation") had attained such a stature in the area of flood control appropriations as to require an Act of Congress to warrant any deviation from it in exceptional circumstances. At that time, a federally assisted project for the control of flood waters on the Mississippi River had reached such mammoth proportions as to have consumed almost $300 million in funds from the project's local sponsors. While exercising care to preserve intact and reaffirm the principle of local contribution for future flood control projects, Congress authorized a departure from it in that case given the exceptional situation presented. See 33 U.S.C. § 702b.

The flood control project out of which this controversy has arisen is not analogous to any in which an exception to the requirement of local contribution has been conferred. Taylors Bayou and its tributaries – while obviously a source of local consternation given their tendency to flood – are not vital arteries of commerce comparable to the Mississippi River. (See n.1, supra, and 33 U.S.C. § 702b). In the reports upon which Congress relied in approving the project, there was no indication that this project would confer benefits upon citizens of other states or enhance navigation. (App., pp. 79-88). Perhaps for these reasons, Congress declined to excuse the local sponsor from acquiring all the needed property and making the required utility relocations when it approved funding for the Taylors Bayou Flood Control Project in 1965. In fact, Congress did exactly the opposite. It expressly conditioned its approval of the project upon the requirement that the local sponsor (Jefferson County Drainage District No. 6) obtain the required property and relocate all utilities and pipelines affected by the project. Pub. L. 89-298, 79 Stat. 1073, §§ 202, 204 (Oct. 27, 1965); 33 U.S.C. § 701c. The local sponsor was required to execute a formal contract (a "Local Cooperation Agreement") committing to the fulfillment of these obligations. Unfortunately, meeting the obligations undertaken in order to receive federal assistance proved too onerous for the local sponsor.

In the absence of any procedures to compel the local sponsor to comply with its statutory and contractual obligations, a local sponsor disinclined to fulfill its undertaking could essentially hold the entire project hostage by refusing to acquire the necessary property and make the necessary utility relocations. To prevent this from occurring, Congress has provided expeditious judicial procedures through which the U.S. Army Corps of Engineers ("the Corps") can immediately obtain the required property while preserving the property owners' right to compensation from the local sponsor. 33 U.S.C. §§ 593, 594. The end result of these procedures is that the property owner obtains just compensation directly from

the local sponsor. *Id.* This result is consistent with both the usual requirements of the legislation approving the project and the Fifth Amendment's mandate that private property cannot be appropriated without such compensation.

In this case, the local sponsor refused to meet the obligations it undertook as a condition to receiving federal assistance. Though originally approved in 1965, the project remained substantially incomplete more than twenty years later. UTTCO owned and operated two of the numerous pipelines that required relocation to accommodate the completion of the project. Claiming that it was too financially strapped to pay the costs associated with relocating these lines, the local sponsor then proposed that the *Corps* acquire the necessary property and obtain the necessary utility relocations by relying upon its so-called "permit powers" and the doctrine of navigational servitude.

Recognizing the obvious conflict between this proposed course of action and the authorizing legislation, the Corps' local officials in Galveston, Texas sought guidance from their superiors. When the local sponsor's plan of action was rejected, it then enlisted the assistance of its local Congressional representative, who supported the local sponsor's plan of action and pressured the Corps to adopt it.

Despite an acknowledgement that this course of action was "arguable and subject to serious challenges", the Corps then decided to implement it. Bypassing the judicial procedures established by Congress for situations in which the local sponsor has not met its obligations, the Corps then embarked upon a series of non-judicial maneuvers designed to accomplish the acquisition of property and relocation of utilities *without cost to the local sponsor.* When the Corps, relying solely upon its authority under § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), demanded that UTTCO relocate its pipelines in such a manner as to comply with the "project specifications", UTTCO stood upon its right to compensation from the local sponsor and ultimately sought a declaratory judgment as to its rights. The Corps then

revoked UTTCO's permits authorizing the placement of its pipelines below Hillebrandt Bayou (one of the Taylor's Bayou tributaries affected by the project), and obtained an order from the District Court compelling removal of the pipelines from the project area.

In affirming the use of such procedures, neither the District Court nor the Fifth Circuit has satisfactorily addressed the conflict between the Corps' use of administrative authority and the statutory scheme through which the local sponsor bears the responsibility for the acquisition of property and the relocation of utilities. The apparent conflict between the authorizing legislation and the Corps' course of action was – as the Corps' own representatives repeatedly acknowledged – a significant obstacle to the implementation of the local sponsor's plan to acquire property and force pipeline relocations through the use of "permit powers". This, coupled with the fact that UTTCO squarely presented these issues to both courts, renders the lower courts' failure to acknowledge and attempt to reconcile this conflict all the more inexplicable. Since the issue is one of Congressional intent, it is of paramount significance and cannot be ignored.

Furthermore, the Fifth Circuit's opinion raises additional issues warranting consideration by this Court. The Fifth Circuit acknowledged that at least a substantial portion of the pipelines the Corps demanded UTTCO to relocate pursuant to the Corps' permit powers lay outside the area subject either to any permit conditions or the navigational servitude. By affirming the Corps' use of permit powers in lieu of condemnation proceedings, the Fifth Circuit has extended the Corps' permit powers far beyond their lawful reach and into the realm of protected property interests. *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979) It has also interpreted the permit conditions to include obligations upon the permittee which cannot, consistently with the Constitution, be imposed. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987).

The opinions of the lower courts now provide judicial precedent for the Corps to continue upon a course of action contrary to virtually all flood control appropriations acts and prior decisions of this court. In light of the great importance of these issues to the numerous flood control projects undertaken nationwide, this Court should now resolve them.

FACTS AND PROCEDURAL HISTORY

Hillebrandt Bayou is a tributary of Taylors Bayou, located near the city of Beaumont, Texas. The intermittent flooding of the Taylors Bayou tributaries has been a matter of local concern for a number of years.

In 1951, UTTCO's predecessor constructed a pipeline in the vicinity of Hillebrandt Bayou. It obtained easements and rights-of-way from the owners of the property on either side of the bayou in order to place the line. Since the pipeline would cross below the bed of Hillebrandt Bayou, UTTCO's predecessor was required to apply for a permit pursuant to § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403). The U.S. Army Corps of Engineers ("the Corps") issued Permit No. 1728 to authorize the work necessary to place the pipeline below Hillebrandt Bayou.

In 1957, UTTCO's predecessor constructed another pipeline crossing Hillebrandt Bayou. Once again, it obtained the requisite easements and rights-of-way from the owners of property abutting the bayou. The Corps issued Permit No. 3779 to authorize the placement of the pipeline below Hillebrandt Bayou.

Both of these permits contained certain conditions. One condition required that in the event of a "future operation of the United States", the permit holder would remove or relocate the portions of the pipelines within the permitted area, without cost to the United States, so as to render *navigation* "free easy and unobstructed". (App., p. 89). This condition is routinely included in permits issued pursuant to § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. The

purpose of this statute, as disclosed by its text, is to prohibit obstruction of *navigation*.

In 1965, a proposal to improve Taylors Bayou and its tributaries came before Congress for its approval. Approval of this project, like approval for the other projects under consideration by Congress at that time, was contingent upon the outcome of a complex "cost/benefit" analysis. As part of this analysis, the anticipated costs of the project were both identified and allocated to the entities who were to bear such costs under the proposal (i.e, the federal government, the local governmental entity sponsoring the project, or third parties). One of the anticipated expenses of the project identified in the District Engineer's report was the cost of "lands, damages, and relocations" for the project. (App., p. 84). This expense item included the cost of pipeline relocations. (App., p. 84). The proposal by the District Engineer specifically allocated the burden of these costs to the proposed project's local sponsor (in this case, Jefferson County Drainage District No. 6). (App., p. 84). The "cost/benefit" analysis also identified and allocated the anticipated benefits of the project. In the District Engineer's report 62% of the total benefits anticipated from the project were allocated to drainage improvement, and 38% of the total benefits were allocated to flood control. (App., p. 84) No *navigational* benefits were identified.[2]

The identification of the proposed project as one solely for flood control and drainage improvement had significant legal and economic consequences for the project's local sponsor. Projects having only the purposes of flood control and

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[2] In determining whether a project has a navigational purpose, the House Document and the various reports set forth in that document are controlling. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950); *United States v. Twin City Power Co.*, 350 U.S. 222, 75 S.Ct. 259, 100 L.Ed. 240 (1956).

drainage improvement are known as "local protection" projects. It has been the longstanding, declared policy of Congress to require the local sponsor of local protection projects to bear all the costs of acquiring lands and easements and making any relocations necessary for the construction. 33 U.S.C. § 701c. In light of the purposes of the project, the proposal sent to Congress for the "Taylors Bayou Project" included a condition that the local sponsor would bear the costs of acquiring all lands, easements and rights of way and making all necessary utility relocations. (App., p. 84). With the modifications recommended by the Secretary of the Army (App., p. 86-88) – which increased rather than diminished the extent of the local sponsor's burden – Congress approved the project for purposes of flood control and drainage improvement. Pub. L. 89-298, 79 Stat. 1073 (Oct. 27, 1965).[3]

After a lapse of several years, the local sponsor contractually affirmed its willingness to comply with this condition by entering into a "Local Cooperation Agreement". However, by 1985 (some twenty years after Congress conditionally approved the project) the local sponsor still had not acquired the necessary lands and made the required utility relocations. When construction commenced on Hillebrandt Bayou, there were scores of pipelines which required relocation. As one

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[3] In a futile attempt to convince the lower courts that the project did in fact have a navigational purpose, the local sponsor and the Corps argued that the general, precatory language applicable to all projects approved by the Flood Control Act of 1965 indicated that this (and presumably every other) project then approved had such a purpose. See Pub. L. 89-298, 79 Stat. 1073, § 204 (Oct. 27, 1965) ("[t]he following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted . . . in accordance with the respective reports hereinafter designated and subject to the conditions set forth therein"). Such general statements of purpose, applicable to an entire group of projects and not intended to be descriptive of the purpose of particular projects, are not determinative of the purpose of individual projects. The "reports" referenced in this statute and found in the pertinent House Document are controlling. See n.2, supra.

Jefferson County representative would later claim, the costs of relocating these pipelines were "more than [the taxpayers of Jefferson County] could possibly bear." Therefore, the local sponsor devised a plan for the Corps to utilize federal "permit powers" under § 10 of the Rivers and Harbors Act of 1899, in such a manner as to diminish or defeat the potential claims against the local sponsor for compensation that pipeline owners and operators might lodge against it.

When the scheme was initially proposed, an attorney-advisor in the Real Estate Division of the Corps' Galveston District opined that there was "sufficient case authority" to require holders of § 10 permits to relocate structures at their own expense. However, the Chief of the Galveston District's Engineering and Planning Division immediately recognized the conflict between this course of action and the legislative requirement that the local sponsor bear these relocation costs. Noting that the advice he had received "appears to be in conflict with the usual authorizing legislation for most of our local protection projects", he asked the District Counsel whether the conditions appearing in the pipeline permits could possibly "supersed[e] the authorizing legislation". The District Counsel opined that "the project appeared to him to be strictly flood control". Based on this opinion, the Galveston District Commander refused to authorize imposition of relocation costs upon the owners without further guidance from the Corps' Southwestern Division office in Dallas.

The Southwestern Division office also rebuffed the local sponsor's plan, concluding that "the local sponsor, Jefferson County Drainage District No. 6, has the obligation to relocate utility lines". Further elaborating, it noted that while "the sample permits included in the file allow the United States to require alterations by the permittee, if necessary to render navigation reasonably free, easy, and unobstructed. . . . [t]he Taylors Bayou Flood Control Project would not cause these lines to obstruct navigation, thus, the permits would not

require relocation at the permittee's expense . . . ". It concluded that "[t]he language of the agreement and the permits in this case compel a decision in favor of the utility owners".

Unwilling to accept defeat, the local sponsor then enlisted the aid of its local Congressional representative (Hon. Jack Brooks, D., Beaumont). In a letter to the Corps' Washington office, the Corps' Southwestern Division Office complained that "the local sponsor is still pressing its position and the matter has now been drawn to the attention of Congressman Brooks who feels costs should be borne by the permittees". This letter culminated in a meeting between Congressman Brooks, Joseph Trahan of the Corps' Galveston District, and Dr. Bory Steinberg of the Corps in Washington. Congressman Brooks, who was intimately familiar with the financial condition of the Drainage District, pressured the Corps to do something that would resolve the impasse. The result of this meeting was the issuance of an opinion letter, stating in pertinent part as follows:

> I find that the alterations and relocations of pipelines that are necessary to construct the project for flood protection on Taylors Bayou must be undertaken and accomplished at no expense to the federal government. I also find that the local sponsor of this project is and must be held to be ultimately responsible for the pipeline alterations and relocations. This is not to deny, however, that you may elect to require that the permittees or owners of the affected pipelines bear the costs of the alterations and relocations that are occasioned by their existing pipelines. *The legal rationale for this requirement will be nonetheless arguable and subject to serious challenges. Accordingly, prior to any federal undertaking to require affected pipeline permittees or owners to bear any expenditures for alterations or relocations of their pipelines for purposes of this project, it will be particularly important that the local sponsor of this project explicitly agree to hold and save the federal government free*

> *from any costs or damages to the federal government that might result from the undertaking* (emphasis added).

Shortly thereafter, the Corps sent a letter to UTTCO which in pertinent part stated:

> Since this is a Federal project in navigable waters of the United States, the aforementioned permits, Section 10 of the Rivers and Harbors Act of 1899, and the Navigation Servitude of the Commerce Clause of the U.S. Constitution require this work to be accomplished at no cost to the Government. The pipelines should be lowered by March 1988. Please inform us of your schedule for the relocations.

As the Fifth Circuit would later acknowledge, the relocation demands to UTTCO *were not limited to the portions of the pipeline to which the permits were even relevant.* The Corps and the local sponsor demanded UTTCO to remove or relocate the pipelines within the entire project area, not just the smaller areas subject to the permit. (App. p. 19)[4]

UTTCO advised both the Corps and the local sponsor that it was ready to commence relocations to fully comply with all project specifications as soon as the local sponsor provided assurance that it was willing and able to fulfill its obligations under the Flood Control Act of 1965. Having received the desired commitment from the Corps to utilize permit powers to defeat or diminish the pipeline owners' claims against it, the local sponsor was now in a position to repudiate its obligations to pay such costs. In response to

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[4] The Fifth Circuit's analysis of the scope of the permit at least implicitly concedes that UTTCO could have fully complied with any obligation to relocate under the permit by simply removing or repositioning the sections of pipeline within the permitted area. (App., pp 28-32). In fact, UTTCO gratuitously offered to perform any required relocation within these areas at its own expense. For two reasons, performing such a partial relocation was not a viable option. First, such a relocation would not have complied with the Corps and local sponsor's demands. Secondly, such relocations would not materially aid the construction of the project, since the sections of pipeline outside the permitted area would still be in conflict with project specifications and prevent widening of the channel.

UTTCO's comments regarding the local sponsor's obligations, the local sponsor replied as follows:

> Since your pipelines cross Hillebrandt Bayou at the sufferance of the U.S. Government by federal permit making you subject to the rules and regulations there of, it would seem inappropriate for you to expect Drainage District No. 6 to reimburse you for the cost of such relocations required by the Corps. Drainage District No. 6 declines to agree to such reimbursement and suggests that if you seek further information or dialogue on this matter that you contact Mr. Joseph Trahan, Chief, Engineering Division, U.S. Army Corps of Engineers, Galveston District.

When UTTCO continued to stand on its right to compensation from the local sponsor, Colonel Tudela of the Corps' Galveston District signed orders purporting to suspend the permits that authorized the original placement of the pipelines. Colonel Tudela did not find that the pipeline constituted "obstructions to navigation" or impediments to the navigable capacity, if any, of Hillebrandt Bayou. As the Corps' District Counsel had already opined, any such conclusion was untenable. The only ground recited for suspending the permits was the fact that UTTCO refused to remove the pipelines after the Corps representatives instructed it to do so, and that it would be in the "public interest" to suspend the permits.

On May 4, 1989, the Corps gave a formal "Notice of Public Hearing on Proposed Revocation" of UTTCO's pipeline permits. The sole purpose of the hearing, according to the notice, was to determine "whether or not the revocation of [UTTCO's permits was] in the public interest." The notice identified only one factor that would be considered in connection with the Corps' decision to revoke or not revoke the permits: "an evaluation of the probable impacts of UTTCO's failing to abide by [the Corps'] directions to lower the pipelines on the public interest." On June 28, 1989, the public hearing was held. At this hearing on the subject of the "public interest", the Corps heard from a number of local interests

who, not surprisingly, unanimously urged the Corps to force UTTCO to relocate its pipelines at its own expense. The Chairman of Jefferson County Drainage District No. 3 rationalized the proposed action as follows: "If the Corps of Engineers does not invoke its authority pursuant to Sec. 10 of the Rivers & Harbors Act of 1899, and pursuant to the terms of the permits, all of the work done and the money spent will have been in vain. The cost of the relocation to the taxpayers would be more than they could possibly bear." As he had previously done in private sessions with Corps representatives, Congressman Brooks urged the Corps to utilize these federal powers for the benefit of his Jefferson County constituents.

This lawsuit was filed on July 20, 1989, naming the Corps and the local sponsor and representatives of both entities as Defendants. Through this suit, UTTCO sought, among other things, a judicial declaration that the Corps was proceeding in violation of the authorizing legislation and the requirement of local contribution in its attempt to shift relocation costs from the local sponsor.

On August 13, 1990, more than one year after the public hearings and well after this lawsuit was filed, the Corps issued orders revoking UTTCO's permits[5] on the basis of its "Statement of Findings." (App., pp. 49-75). Like the previous suspension letter UTTCO received, the "Statement of Findings" included no determination that the pipelines were obstructing navigation. The Corps merely found that the "pipelines do not meet specifications and must be removed or relocated in order to meet such specifications". (App., p. 75).

UTTCO, the Corps, and the local sponsor ultimately filed motions for summary judgment in the pending lawsuit. At a hearing held on June 20, 1991, the District Court announced that it would deny UTTCO's motion, grant in part the motions of the Defendants, and sever the causes of action that were

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[5] The revocation date is erroneously stated to be August 13, 1989 in the District Court's Memorandum Opinion. (App., p. 44).

not resolved summarily so as to facilitate UTTCO's appeal. Its written opinion was subsequently issued and published. (App., pp. 42-48).

Although the question as to whether the Corps' use of "permit powers" was consistent with the authorizing legislation was specifically presented to the District Court by way of UTTCO's responsive pleadings, the District Court viewed the controlling issue as merely one of who "*should*" bear the costs of pipeline relocations. (App., p. 45). Without any discussion of what Congress had already decreed, the District Court resolved this issue by reference to the permit language and its own concepts of fairness and equity. (App., pp. 46-47). While declining to address the requirements of local contribution as set forth in the relevant statutes, the District Court briefly discussed the related "Local Cooperation Agreement". The District Court opined that the informal arrangement under which the local sponsor would indemnify the Corps for damages occasioned by its use of the permit power satisfied the requirement of local cooperation. (App., p. 47).

The District Court ordered UTTCO to remove its pipelines from the project area. UTTCO sought a stay of this order during the pendency of its appeal. When both the District Court and the Fifth Circuit denied UTTCO's request for a stay,[6] it then removed its lines while continuing to pursue an appeal.

In its brief to the Fifth Circuit, UTTCO presented two issues. The first issue presented was whether the evidence and the Corps' findings established an adequate basis for the revocation of UTTCO's permits. The second issue, as stated verbatim from UTTCO's brief before the Fifth Circuit, was as

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[6] Subsequently, the Fifth Circuit would attempt to read into UTTCO's removal of its lines a concession as to the validity of the Corps' actions. (App., p. 41). Any such inference is patently untenable. UTTCO removed its pipelines upon failing in its efforts to obtain a stay from the District Court and the Fifth Circuit. Obviously, it was compelled to remove its pipelines or face citation for contempt of court.

follows: "Did Congress intend that pipeline relocation costs incident to the Taylors Bayou Flood Control Project would be shifted to owners or operators of such pipelines through use of the federal "permit" power or "navigational servitude", or did it contemplate that such costs would be borne by the local sponsor, as UTTCO contends?".

Although its analysis of the case differed substantially from that of the District Court, a Fifth Circuit panel unanimously affirmed the District Court's judgment through an opinion issued on November 18, 1993. (App., pp. 16-48). The Fifth Circuit concluded that substantial portions of the pipelines that the Corps demanded UTTCO to relocate (under the threat of permit revocation) were not in fact subject to the permit conditions at all, since they were situated outside the areas to which the permit or the "navigational servitude" applied. (App., p. 39). Nonetheless, the Court concluded that because of the "undeniable and undenied" proposition that the Corps had absolute authority over areas *outside* both the scope of the permit and the navigational servitude[7], UTTCO's permits were properly revoked due to its failure to comply with the Corps' demands. (App., p. 39). It also concluded that when at least a portion of a pipeline requiring relocation falls

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[7] As UTTCO pointed out in its Motion for Rehearing in the Fifth Circuit, the only grounds of authorization advanced by the Corps for its demands to UTTCO were the permit conditions and the navigational servitude (which UTTCO had specifically challenged as inapplicable due to the Congressional mandate that the local sponsor should acquire all property and make all relocations). In light of this fact, the Fifth Circuit's notion that the Corps' authority extended beyond these areas is not only without judicial precedent, but contrary to its earlier-stated conclusion that neither the permit conditions nor the navigational servitude applied to at least a substantial portion of the pipelines over which the Corps asserted such authority. Furthermore, the statement that the Corps' authority over areas outside the permit area was "undenied" is equally insupportable. The proposition that the Corps lacked authority under the permit power was denied in UTTCO's brief to the court and, ultimately, by the Fifth Circuit's own opinion.

within the "permit area", the pipeline owner is under an absolute obligation to relocate or remove the lines upon request by the Corps. According to the Fifth Circuit, when UTTCO refused to relocate its lines, the mere refusal to do so constituted "self help" and an unwarranted game of "hard ball" justifying revocation of its pipeline permits. (App., p. 39).

Curiously, the Fifth Circuit never bothered to address the second issue presented to it in UTTCO's appeal. The opinion of the court is wholly devoid of any reference to the statutory requirements pertaining to the local sponsor. Despite the fact that the issue was raised and briefed in the District Court, preserved for appeal, specifically identified as one of the two issues presented for appellate review, and discussed in seventeen pages of UTTCO's brief, the Fifth Circuit not only ignored the issue but repeatedly stated that the Corps' authority to rely upon its permit powers was *undisputed* by UTTCO.[8] (App., pp. 39-40). Indeed, the Fifth Circuit's opinion treated the issue of the Corps' authority to utilize permit conditions as if it were a foregone conclusion, immediately launching into a discussion of the proper interpretation and scope of UTTCO's permit conditions without bothering to explain how the permits were even relevant to the dispute. Logically, if Congress intended that the local sponsor bear relocation costs (as UTTCO contends) then the language of the permit conditions or the applicability of these conditions are hardly relevant (and much less decisive) considerations. As the Fifth Circuit itself has previously held, such permit conditions do not inure to the benefit of local sponsors so as to lessen their acquisition costs. *Tenneco v. Greater LaFourche Port Commission*, 427 F.2d 1061, 1066 (5th Cir. 1970).

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[8] Moreover, UTTCO pointed out in its Motion for Rehearing that the panel had failed to adequately address this issue. (App., pp. 3-9).

ARGUMENT

Under the lower courts' opinions, it is now a relatively simple matter for a flood control project's local sponsor to escape its financial responsibilities, provided that the Corps is inclined to look the other way and not insist upon strict compliance with the requirement of local contribution. Without so much as a pauper's affidavit in hand, the local sponsor need only assert an inability (or perhaps even a mere disinclination) to meet its statutory and contractual obligations. In disregard of statutory procedures prescribed for situations in which such local sponsors fail or refuse to comply with their commitments, the Corps may then institute relocation demands to utility owners, and it may back these demands with the threat of an administrative revocation of their permits.

The availability of this course action to the Corps and the local sponsor poses a clear threat to the principle of local cooperation. Because the Corps' resort to this use of "permit powers" offends longstanding congressional policies and the implicit objectives of enacted laws, it cannot be permitted.

The starting point in the analysis of this issue is the relationship of the Corps to Congress. The source of federal authority over navigable waterways is the power conferred upon *Congress* under the Commerce Clause of the Constitution. *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979). In contrast to Congress, the Corps of Engineers has no independent source of authority over navigable waters. All of its authority is derived through the delegation of powers from Congress. Thus, it is axiomatic that: (1) the Corps only possess such powers that have been delegated to it by Congress, and (2) when acting pursuant to a power delegated to it by Congress, the Corps may exercise discretion only in matters that have been relegated to its discretion. When Congress has directed a particular course of action or resolved a particular matter, the Corps is utterly without authority to decide to do otherwise – even if the particular matter would ordinarily be within the scope of the

authority delegated to it by Congress and thus commended to its discretion.

If Congress had so desired, it could have provided that the federal government, not the local sponsor, would have the duty to acquire all lands and easements and make all utility relocations necessary to complete the Taylors Bayou Flood Control Project. If it had deemed it appropriate to do so, Congress could also have given the potential benefits (if any) of permit conditions and the federal navigational servitude to the local sponsor,[9] by providing that the local sponsor had only the duty to indemnify the Corps for claims not extinguished by the application of permit conditions or navigational servitude[10]. The simple fact is that Congress elected not to do so. It chose instead to treat the Taylors Bayou Flood Control project as it has treated virtually all other local protection projects it has ever approved. It required the local sponsor to obtain all the necessary property and make all the necessary utility relocations. As the Fifth Circuit has already held, the conditions found in permits issued pursuant to § 10 of the Rivers and Harbors Act do not inure to the benefit of local entities. *Tenneco v. Greater LaFourche Port Commission*, 427 F.2d 1061, 1066 (5th Cir. 1970). It is elementary that authority conferred to the federal government through the navigational servitude is inapposite to local entities.

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[9] This assumes, of course, a determination by Congress that the project in question had a navigational purpose. Based upon the utter lack of any navigational purpose to this project, allowing the operation of permit conditions or the navigational servitude to inure to the local sponsor's benefit would have been pointless.

[10] This is in fact precisely the arrangement hammered out between the Corps, the local sponsor, and the local sponsor's Congressional representative when it became clear that the local sponsor could not or would not fulfill the obligations actually imposed by Congress. Unfortunately for both the Corps and the local sponsor, the involvement of a single congressional representative in the process does not lend to this arrangement the stamp of congressional approval.

Congress has also provided a statutory means by which the Corps can expeditiously acquire property that a flood control project's local sponsor has obligated itself but failed to obtain. Consistent with the requirement of local contribution found in virtually all flood control legislation, resort to these judicial procedures culminates in a judgment against the local sponsor for the value of the property so obtained. 33 U.S.C. §§ 593, 594. These statutory procedures strike a balance between the Corps' interest in completing the project without delay, the property owner's rights, and the local sponsor's responsibilities under the legislation authorizing the project.[11] When viewed in light of the requirement of local cooperation, these provisions evidence that in the acquisition of property for flood control projects there are three statutory objectives: (1) timely completion of the project by the Corps; (2) fulfillment of the local sponsor's obligations; and (3) prompt payment of just compensation for the property so acquired by the local sponsor. By resort to such procedures, the Corp can accomplish these objectives regardless of the local sponsor's willingness to voluntarily meet its obligations.

By affirming the Corps' use of permit conditions and administrative permit revocation proceedings to acquire property and compel utility relocations, the lower courts have

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[11] Resort to these procedures is, of course, not mandatory in the sense that the Corps must pursue this alternative to the exclusion of other courses of action *consistent with the requirement of local cooperation.* The statute conferring this remedy to the Corps states that the "Secretary of the Army, in his discretion, may cause the institution of such proceedings". This merely signifies that the Corps is not required to come to the aid of the local sponsor by acquiring such property, but may pursue other alternatives provided that they are consistent with the overall statutory scheme. Thus, the Secretary of the Army could, for example, elect to cause a suit to be filed for specific performance of the Local Cooperation Agreement, since this course of action would be equally consistent with the primary statutory objectives. However, the fact that resort to these procedures is discretionary does not mean that the Corps can opt to employ an alternative procedure inconsistent with the requirements of applicable law.

approved the use of an unauthorized substitute for these statutory procedures and allowed the Corps to run roughshod over the will of Congress in the process. Essentially, the lower courts have determined, albeit *sub silentio*, that the unwillingness of a local sponsor to meet its obligations provides an adequate excuse to the Corps to disregard the legal requirements imposed upon the local sponsor, ignore the procedures Congress has provided for just such an event, and rely upon self help.[12] According to the lower courts, when the Corps – in the exercise of its apparently unfettered discretion – elects not to invoke the procedure Congress has created to deal with a recalcitrant local sponsor – it then becomes improper for the property owner to insist upon either compensation or compliance with the letter of the authorizing legislation.[13] At the end of the day, the property owner is left in a state of limbo, holding only a claim against the local sponsor that is of doubtful economic worth.[14] Far from striking a

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[12] It is most ironic that the Fifth Circuit would refer to UTTCO's actions as "self help". All UTTCO has ever done is insist that the Corps and the local sponsor abide by what Congress has decreed. UTTCO's actions could be more aptly characterized as "self defense".

[13] Apparently, to insist upon either or both constitutes, in the words of the Fifth Circuit, playing an unwarranted game of "hardball".

[14] In at least two respects the statutorily-prescribed scheme for acquiring property starkly differs from the surrogate administrative procedures authorized by the lower courts' opinions. First, under the statutorily-prescribed scheme for acquiring property interests that the projects' local sponsor is legally required to furnish, it is contemplated that such acquisitions will be made through initiation of *judicial proceedings*, not through threats of permit revocations and Corps-conducted administrative proceedings brought for the purpose of enforcing such threats. Judicial involvement in such proceedings not only insures a fair and impartial tribunal and minimizes the risk of an erroneous deprivation of property interests, but also insures that all of the issues (including that of compensation) will be comprehensively resolved and thereby avoids the necessity of piecemeal determinations. Secondly, the statutory scheme created by Congress explicitly provides that the local sponsor will bear the costs of all awards and expenses of such proceedings (for which costs it may be

balance between the competing interests of the parties involved, the Corps' resort to such "self help" procedures elevates the interest of the Corps in completing the project above all other concerns, while denigrating the property owners' rights and giving short shrift to the statutory responsibilities of the local sponsor. As compared to the procedures authorized by Congress, the unprecedented procedures utilized by the Corps in this case are obviously deficient and lead to results not contemplated by and contrary to the legislation authorizing the project. Furthermore, the use of powers under § 10 of the Rivers and Harbors Act (33 U.S.C. § 403) against compensable property interests in lieu of condemnation proceedings is flatly contradictory to this Court's opinion in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 343, 62 L.Ed. 2d 332 (1979).

Given the Fifth Circuit's conclusion that the Corps' relocation demands to UTTCO encompassed sections of pipeline beyond either the scope of the permit conditions or the navigational servitude, the expressed intent of Congress is not the only impediment to the Corps' reliance upon permit powers to relieve the local sponsor's burden. In light of this conclusion, both the Corps' actions against UTTCO and the District Court's order that it remove its pipelines from the entire project area (based on the Corps' prior actions) amounted to a non-jurisdictional confiscation of UTTCO's property unauthorized by either the permit conditions or the navigational servitude. The notion that the Corps' permit power or the related navigational servitude extends to fast lands outside the scope of either – described by the Fifth Circuit as an "undeniable and undenied" proposition – is, in

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required to post a bond as a condition for initiation of such proceedings). Indeed the requirement that the land owner receive reasonable compensation for the property affected by the invocation of such powers is one of the limitations that Congress has expressly placed upon the governments' authority in these matters. *United States v. 49.79 Acres of Land*, 582 F.Supp. 368 (D.Del. 1983).

the words of the Eleventh Circuit, simply "ludicrous". *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991).[15] As this Court has itself observed, none of its own decisions "have ever doubted that when the Government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to *condemn* and pay fair value for that interest." *Kaiser Aetna*, 444 U.S. 164, 177, 100 S.Ct. 383, 391 (emphasis added). The administrative invocation of authority under § 10 is in no way equivalent to the invocation of eminent domain authority through the commencement of condemnation proceedings. Indeed, implicit in the invocation of permit authority is the notion that the party against whom it is invoked has no property interest whatsoever in the permitted area. Since the permit powers and the navigational servitude were the only sources of legal authority ever advanced by the Corps for its relocation demands to UTTCO, neither the Corps' overbroad relocation demands nor the District Court's conclusion that UTTCO was required to relocate the pipelines at its own expense within the entire project area could be legitimately affirmed by the Fifth Circuit. To do so sanctioned a confiscation of property without either proper authorization for such a taking or the necessary condemnation procedures. *Kaiser Aetna, supra.*

Furthermore, the lower courts have essentially read into UTTCO's § 10 permits an implied obligation upon UTTCO to relocate its utility even in areas outside the permit's scope area in order to facilitate the construction of a local protection project. This construction is contrary to this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987). In *Nollan*, this Court confronted a situation in which an administrative agency sought to condition the issuance of a rebuilding permit for a beach house upon the homeowner's concession of a public

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[15] Regarding the Fifth Circuit's assertion that this proposition was "undenied" by UTTCO, it is interesting to note that UTTCO cited *Harrell* for this very proposition no less than three times in its brief to the panel.

beach access easement across its property. Though acknowledging that the government may condition the owner's use of property in a particular manner upon the owner's concession of property, the Court held that the condition must further the same governmental purpose advanced as justification for otherwise prohibiting the use. The record clearly showed that the rebuilding of the Nollans' home would not create any additional impediment to public access to the beach. Thus, this Court concluded that the condition the agency sought to impose did not further the same purpose advanced by otherwise refusing to allow the rebuilding of the home, and struck down the imposition of this condition.

According to the rationale of the lower courts in the case at bar, the administrative agency in *Nollan* could have obtained a different result from this Court by merely doing things in a slightly different manner. Under the reasoning of the lower courts, the California Coastal Commission could have conditioned the issuance of the Nollans' permit upon a promise by the Nollans that the house they were building would not obstruct access to the beach. Once the house was built, the Commission could then insist that the Nollans grant public easements across private tracts of property (even property *other than that to which the building permit technically applied)* in order to retain the permit and avoid having their house torn down, basing all of these demands upon the permit condition. If the Nollans then filed suit (and meanwhile had their permit administratively revoked for failing to comply with the agency's demands) then, under the Fifth Circuit's rationale, the court hearing the Nollans' suit need not determine the governmental purpose served by the initial imposition of the permit condition[16], and need not inquire as to

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[16] As UTTCO pointed out in its briefs both in the District Court and the Fifth Circuit, the sole purpose of § 10 of the Rivers and Harbors Act and the condition in question in the permits issued pursuant to that statute was to prevent obstructions to navigation. The Corps did not find, and its own representatives conceded it was impossible to find, that UTTCO's pipelines obstructed navigation.

whether the Commission's directives to the Nollans served the same governmental purpose as the permit condition.[17] In the event that the Commission's demands for cessation of easements extended to areas to which the building permit did not technically apply, the court could either declare, without citation to any judicial or statutory precedent for the proposition, that the easements on this property were still somehow within the Commission's power to take, or simply uphold the action on the grounds that the Nollans "played hardball" by refusing to do what the Commission ordered it to do "under formal protest".

The result reached by the lower courts is untenable under *Nollan*. The purpose of § 10 of the Rivers and Harbors Act and Condition (f) of the permits issued pursuant to that section is to assure that navigation will remain – in the words of the permit condition – "free, easy and unobstructed". (App., p. 89). This purpose is readily discernible by a textual reading of both the statute and the permit condition. *Id.* There is no reasonable nexus between the purpose of the permit condition and motivation of the Corps in invoking it. The project in question clearly had no navigational purpose. The Corps was not motivated by a desire to further such a purpose in making its demands upon UTTCO. The purpose of invoking permit conditions was merely to provide a way to force relocations without costs to either the federal government or

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[17] The Fifth Circuit expressly declined to consider the questions of whether the project had any navigational purpose and whether the Corps' invocation of the permit condition was motivated by such a purpose. (App., pp. 29-30). The related House Document, as well as Congress's imposition of the requirement that the local sponsor acquire all the land and make all utility relocations, establishes that this project had no navigational purpose. Furthermore, the Corps' invocation of its permit powers had nothing to do with furthering the nonexistent navigational purpose of this project. It was motivated by the local sponsor's asserted inability or unwillingness to meet its obligations under the authorizing legislation.

the local sponsor. Furthermore, even if there were a navigational purpose and the Corps' use of permit conditions furthered that purpose, the simple fact remains that the Corps' relocation demands encompassed areas outside either the scope of the permit condition or the navigational servitude.

In short, if the Corps itself desired to accomplish the relocation of the pipelines without waiting for or compelling the local sponsor to do so, what the Corps was required to do under the facts of this case was to request institution of a proceeding under 33 U.S.C. § 593. Resort to permit conditions not only deviated from what Congress intended in approving the project, but amounted to a flagrant abuse of federal power.

REASONS FOR GRANTING THE WRIT

1. By holding that the Corps can utilize its permit powers to compel utility owners to relocate utilities for the benefit of a local sponsor to whom Congress has specifically assigned the task of such relocations, the lower courts have decided an important question of federal law which has not been, but should be, decided by this Court. Sup. Ct. R. 10.1(c).

2. By holding that the Corps can generally resort to permit conditions in lieu of condemnation proceedings for the benefit of a flood control project's local sponsor, the Fifth Circuit has decided a question of federal law in a manner contrary to this Court's opinion in *Kaiser Aetna v. United States*, 444 U.S. 164, 177, 100 S.Ct. 383, 391-2, 62 L.Ed. 2d 332 (1979). Sup. Ct. R. 10.1(a).

3. By holding that the authority of the Corps pursuant to § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) extends to fast lands outside the areas subject to such permits, the Fifth Circuit rendered a decision in conflict with the Eleventh Circuit in *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991). Sup. Ct. R. 10.1(a).

4. By holding that permit conditions having a navigational purpose may be invoked for purposes of relieving a local sponsor's financial burdens imposed as a condition for federal assistance, the lower courts have interpreted such conditions in a manner conflicting with this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987).

CONCLUSION

United Texas Transmission Co. respectfully requests that its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully Submitted,

CHARLES MICHAEL CLARK
DENNIS M. DYLEWSKI

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4638

UNITED TEXAS TRANSMISSION COMPANY,

Plaintiff-Appellant,

versus

UNITED STATES ARMY CORPS OF ENGINEERS, Etc., ET AL.,

Defendants-Appellees

Appeal for the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING
(JANUARY 5, 1994)

Before JONES and WIENER, Circuit Judges, and LITTLE,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. Weiner
United States Circuit Judge

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*District Judge of the Western District of Louisiana, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

No. 91-4638
UNITED TEXAS TRANSMISSION COMPANY,
Plaintiff - Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *ET AL.*,
Defendants - Appellees

APPELLANT'S MOTION FOR REHEARING
(EXCERPTS)

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. . . .

STATEMENT OF ISSUES ON REHEARING

. . . .

REHEARING ISSUE FIVE: Did the Court err in its legal conclusion that UTTCO's permits were properly revoked for its failure to comply with Corps' demands even if all of the relocation required was outside the original permit channel?

REHEARING ISSUE SIX: Does the Court's opinion conflict with *Tenneco v. Greater LaFourche Port Commission*, 427 F.2d 1061 (5th Cir. 1970) by allowing permit conditions to inure to the benefit of non-federal governmental agencies?

REHEARING ISSUE SEVEN: Did the Court err in failing to determine whether the Corps' reliance upon its permit powers was consistent with the legislation authorizing the flood control project?

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II.

ARGUMENT UNDER REHEARING ISSUE FIVE

In the course of its opinion, the Court seems to suggest that even if all relocations required to accommodate the project were to occur in fastlands outside the original permit channels, the District Court's judgment would nonetheless be affirmed due to the Corps' "absolute authority to order relocations in the fastlands". (Opinion, p.22) According to the Court, UTTCO has "never questioned the Corps' authority to order relocation in the fastlands" (Id.) and therefore engaged in a "strong-arm tactic" by refusing to yield to such "unquestioned" authority. (Id.)

It is correct as a general proposition that the Corps can acquire lands, easements and rights-of way [sic] necessary for the construction of federal projects. The authority of federal agencies to acquire real estate for public uses is described by statute. See 40 U.S.C. §§ 257, 258a. Section 257 provides, in pertinent part, as follows:

> **In every case in which the Secretary of the Treasury or any other officer of the Government has been . . . authorized to procure real estate for . . . public uses, he may acquire the same for the United States *by condemnation, under judicial process,* whenever in his opinion it is necessary or advantageous to the Government to do so. . . .**

40 U.S.C. § 257 (emphasis added). With respect to condemnations for Corps-related projects, 33 U.S.C. § 591 provides as follows:

> **The Secretary of the Army may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; *such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted* . . .**

33 U.S.C. § 591. Where (as here) the legislation authorizing the improvement project has placed the burden upon the Local Sponsor to acquire all the lands, easements and rights of way necessary to complete the project and the Local Sponsor cannot accomplish that task for some reason, then the procedure for the acquisition of the property required is as set forth in 33 U.S.C. § 593. That statute provides as follows:

> **Whenever any. . . . drainage district . . . shall undertake to secure any land or easement therein, needed in connection with a work of**

> **river and harbor improvement duly authorized by Congress, for the purpose of conveying the same to the United States free of cost, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of the Army may, in his discretion, *cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of said land or easement,* and it shall be the duty of the Attorney General of the United States to institute and conduct such proceedings upon the request of the Secretary of the Army: Provided, That *all expenses of said proceedings and any award that may be made thereunder shall be paid by such . . . drainage district. . . .* to secure which payment the Secretary of the Army may require such . . . drainage district . . . to execute a proper bond in such amount as he may deem necessary before said proceedings are commenced.**

33 U.S.C. § 593 (emphasis added).

Clearly, under the statutorily- prescribed scheme for acquiring property interests such as UTTCO's, it is contemplated that such acquisitions will be made through initiation of *judicial proceedings,* not Corps-conducted administrative proceedings brought for the purpose of forcing relocations through threats of permit revocations. Furthermore, where the federal eminent domain authority is being invoked for the benefit of a Local Sponsor who is required by law to provide the needed land to the Corps free of cost, the statutory scheme created by Congress explicitly provides that the Local Sponsor will bear the costs of all awards and expenses of such proceedings

(for which costs it may be required to post a bond as a condition for initiation of such proceedings). Finally, the requirement that the land owner receive reasonable compensation for the property affected by the invocation of such powers is one of the limitations that Congress has expressly placed upon the governments' authority in these matters. *United States v. 49.79 Acres of Land*, 582 F. Supp 368 (D.Del. 1983).

The Corps' course of action in this case stands in stark contrast to the procedure prescribed by law for acquisition of property interests such as UTTCO's. *See* 42 U.S.C. § 4651 (8). The Corps never filed any declaration of taking. To the best of UTTCO's knowledge, the Corps never requested the Attorney General to institute proceedings against UTTCO to obtain its property. Certainly, no judicial proceedings were ever instituted for the purpose of taking UTTCO's property. Moreover, the Corps did not physically enter into possession of UTTCO's easements and take UTTCO's property through inverse condemnation. *See Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984).

The Court's observation that it is of no concern *why* the Corps chose to invoke its permit powers (Opinion, p.4,fn.) indicates that the Court fails to understand the fundamental distinction between the means the Corps chose to accomplish the desired result and the procedures prescribed by law for the acquisition of property. The statutorily prescribed scheme for acquisition of property assures that the property owner will obtain compensation from the appropriate entity (in this case, the Local Sponsor). *See* 33 U.S.C. § 593. In fact, it contemplates that the Local Sponsor may have to post a bond for such costs

before the condemnation proceedings are ever instituted by the Attorney General. *Id.* Because the Corps wanted to *negate* UTTCO's right to compensation and recognized that the Local Sponsor did not have the financial means to pay for UTTCO's property, it deliberately eschewed the appropriate procedures for invoking its eminent domain powers. In this case, UTTCO's representatives repeatedly invited the Corps to invoke its condemnation powers and take UTTCO's property, but the Corps flatly refused (knowing that this course of action would give rise to the necessity of paying UTTCO for its property). Instead, the Corps first used threats of permit revocation and then misused the administrative process as a means to force UTTCO to yield its property rights in a way that would have *precluded* UTTCO's recovery against either the Corps or the Local Sponsor. In light of the way that the Corps chose to proceed, it is wholly inappropriate for this Court to rely upon the Corps's eminent domain authority to uphold what the Corps' did in this case. The existence of the Corps' broad condemnation powers cannot serve as a basis for affirming the exercise of its more limited permit powers, particularly when the latter were invoked for the purpose of averting the legal consequences of utilizing the former. As broad as the Corps' condemnation powers might be, the *permit powers* are limited as a matter of law to the area defined by the original permit channels. The former cannot be used as a basis for enlarging the latter or as a surrogate for condemnation.

If the Court means to suggest that the use of permit powers and the initiation of administrative proceedings against UTTCO constituted an invocation of the federal

government's broad eminent domain powers, then the Court's decision is wholly unprecedented. In addition to the statutory methods invoking such powers, there is only one other recognized method of invoking such authority: inverse condemnation. *See Kirby*, supra. Does the Court mean to state that what the Corps did amounted to "inverse condemnation"? If so, the Court should explicitly state as much.[1]

Finally, the Court's observations that "UTTCO does not contest the Corps' ability to order the relocation of portions of the pipelines that are situated in the fastlands" (Opinion, p.15) and that "UTTCO has never questioned the Corps' authority to order relocation in the fastlands" (Opinion, p. 22) are patently incorrect if the Court is referring to the Corps' ability to do so through exercise of the *permit power*. UTTCO has argued repeatedly and consistently at the administrative level, at the District Court and in this Court that *permit powers* cannot be utilized to require relocations of pipelines within or outside the original permit channel when the authorizing legislation places the burden to make such relocations upon the project's Local Sponsor. As stated in UTTCO's briefs to the District Court:

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[1] UTTCO is aware of no authority for the proposition that an exercise of *permit power* gives rise to a right of compensation. Indeed, when such powers are properly invoked, the result is to *extinguish* any compensable property interest (which is precisely why UTTCO resisted the Corps' action). Thus, by stating that UTTCO would have been entitled to recover if it had relocated (Opinion, p.23), the Court at least implicitly holds that the Corps' actions constituted a condemnation.

> Notwithstanding the United States' attempt to recast UTTCO's claims as a "a claim for an alleged taking of its property" [citation omitted], the gravamen of UTTCO's complaints against the Federal Defendants is that they were wholly without authority to order removal of UTTCO's pipelines through the permit revocation proceeding in question . . .

(UTTCO's Mem. in Resp. to Federal Defendants Mtn. for Sum. Jdgmnt., p. 3)

> The U.S. Army Corps of Engineers, acting through its § 10 permit powers in an administrative proceeding, has no power to appropriate private property for the benefit of a flood control project. Rather, the Corps must institute judicial condemnation proceedings. As such, any taking of property through an administrative proceeding is unauthorized, regardless of whether "just compensation" is available or not. . . .
>
> There is no authority for taking private property through § 10 permit revocation proceedings. Since the Defendants obviously desired to appropriate UTTCO's private property for the benefit of the [project], the appropriate course of action would have been to either negotiate the removal or relocation of UTTCO's pipelines, or request initiation of condemnation proceedings. It was wholly inappropriate to make non-jurisdictional use of the § 10 "permit power" to accomplish such a taking.

(UTTCO's Reply to the Responses to its Motion for Summary Judgment, pp. 2, 25).

III.

ARGUMENT UNDER REHEARING ISSUES SIX AND SEVEN

While UTTCO agrees with much of the Court's discussion regarding the four types of factual situations that may be encountered in disputes involving Condition "F", the fact remains that here there is a *legal* situation which renders much of this discussion irrelevant: *Congress placed the burden of relocating all pipelines upon a Local Sponsor, to whose benefit permit conditions do not inure.*

The means by which the Court's Opinion avoids discussion of this issue is its reliance upon more purported "concessions" by UTTCO as to its liability for relocation costs and the propriety of the Corps' use of permit authority.[2] These issues have *not* been conceded.

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[2] The Court stresses the existence of these alleged concessions throughout its Opinion: (1) "one of the aspects of this litigation which is not disputed is that permit-holders must pay for the movement of any portion of a pipeline that is located within the original permit area". (Opinion, p.9); (2) "UTTCO agrees with the principle that the pipeline owners must pay for alterations to portions of the pipelines within the bayou's channel"(Opinion, p. 10); (3)"[T]he authority to order the relocation of the pipelines inside the boundaries of the original permit area at the expense of the pipeline owners. . . . is not in dispute (Opinion, p. 11); (4) "[N]o one seriously contests the rule that the cost of relocating the portion of a pipelines [sic] lying between the original banks of the bayou . . . must be borne by the pipeline owner" (Opinion, p.15); and (5) "UTTCO never challenged the Corps' authority to order the relocation" (Opinion, p.23). The Court also interprets the fact that UTTCO removed its pipeline as a concession by UTTCO as to the Corps' authority. (Opinion, p.24). In fact, the Court seems to suggest that *because* UTTCO never challenged the Corps' authority to do

As stated in UTTCO's opening brief to this Court, there are two issues presented in this appeal. The first of these issues focusses upon the conclusions and evidentiary facts relied upon the Corps as a basis for the revocation of UTTCO's permits. This is the issue the Court has addressed in its Opinion. The second issue – which has nothing to do with the sufficiency of the Corps' findings and conclusions and which the Court's Opinion *has not addressed* – is whether the Corps had the authority to rely upon its permit powers at all in view of the requirement that the *Local Sponsor* must make such relocations. This issue was stated as follows in UTTCO's opening brief:

> **Did Congress intend that pipeline relocation costs incident to the Taylors Bayou Flood Control Project would be shifted to owners or operators of such pipelines through use of the federal "permit" power or "navigational servitude", or did it contemplate that such costs would be borne by the local sponsor, as UTTCO contends?**

(Appellant's Brief, p.2). When an issue is explicitly identified as one of the two issues on appeal and seventeen pages of an appellant's brief are then devoted to an

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what it did and acknowledges its responsibility to pay for relocation within the original permit channel, the Court cannot say that the Corps abused its discretion by revoking UTTCO's permits.(Opinion, p. 23).

None of the above quoted statements correctly reflect UTTCO's position. Moreover, UTTCO removed its pipelines solely because it was ordered to do so by the District Court and was unsuccessful in its attempts to obtain a stay of this order in both the District Court and this Court.

argument of that issue, it is difficult to comprehend how the issue could possibly be regarded as "conceded".[3]

The only "concession" that UTTCO has ever made with respect to the Corps' permit powers is no "concession" at all, but merely a restatement of the permit condition: that when permit powers are properly invoked, the pipeline owner must relocate its pipelines within the original permit channel *without cost to the United States* to the extent necessary to accommodate the project. (See Opinion, p.11,fn.). It is impossible to read into such statements an acknowledgment that permit powers were properly invoked in this case or that the relocations must be accomplished *at the pipeline owner's expense.* It has been UTTCO's position at every stage of this case that: (1) the Corps could not rely on permit powers to compel relocations since the authorizing legislation placed the burden of making such relocations on the Local Sponsor to whose benefit the permit conditions do not inure; and (2) regardless of whether all or part of the relocation was accomplished *without cost to the United States,* UTTCO was entitled to recover all of such expenses *from the Local Sponsor* who was rendered fully liable by statute for such costs.

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[3] Furthermore, this issue did not appear for the first time in UTTCO's brief to this Court. In the District Court, UTTCO repeatedly argued that the Corps' exercise of permit powers was unlawful, unauthorized and non-jurisdictional (*see* above) and that permit powers could not be used for the benefit of relieving the Local Sponsor of its obligation to pay for *all pipeline relocations.*

In fact, the Court's Opinion (having previously relied upon non-existent "concessions" by UTTCO) later recites UTTCO's true position regarding both the "permit powers" and UTTCO's responsibility to bear relocation costs. At page 22, the Opinion states:

> *[UTTCO] demanded that the Drainage District assure reimbursement for the entire relocation costs* – an allocation of costs that could never be correct in view of the fact that portions of the pipelines unquestionably were within the original stream bed.

(Opinion, p. 22, emphasis added). While the Court summarily rejects the view that the Local Sponsor could be held liable for all of the relocation costs due to its erroneous impression that pipeline sections within the permit channel needed to be relocated, it does so without acknowledging that there is an Act of Congress and a prior opinion from this Court which dictates this very allocation of costs, even if there *was* a need to relocate in the original permitted area. As fully discussed in UTTCO's opening brief to the Court, Congress approved this project only upon the condition that the Local Sponsor would make *all* necessary pipeline relocations. It did make any exceptions for pipelines lying within areas permitted under § 10. In short, "all" means all. Moreover, this Court has previously held that permit conditions do not inure to the benefit of local entities. *Tenneco v. Greater LaFourche Port Commission*, 427 F.2d 1061, 1066 (5th Cir. 1970). In holding that allocating all relocation costs to the Local Sponsor could "never be correct", the Court not only holds directly contrary to the mandates of the Flood Control Act of 1965, but ignores its own precedent.

PRAYER AND CONCLUSION

UTTCO requests the Court to grant this Motion for Rehearing, and that upon rehearing, the judgment of the District Court be REVERSED.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

This is to certify that on December 1, 1993, a true and correct copy of the foregoing document was served, by

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APPENDIX C

United States Court of Appeals, Fifth Circuit.

No. 91-4638.

UNITED TEXAS TRANSMISSION COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Etc., et al., Defendants-Appellees.

Nov. 18, 1993.

7 F.3d 436; 1993 U.S. App. Lexis 29843

Appeal from the United States District Court for the Eastern District of Texas.

Before JONES and WIENER, Circuit Judges, and LITTLE,[1] District Judge.

WIENER, Circuit Judge:

We write today to resolve a long-standing dispute as to the party responsible for the costs of relocating sections of two pipelines which, pursuant to permits issued by the United States Army Corps of Engineers (the Corps), ran under the Hillebrandt Bayou (the bayou) in Southeast Texas. At all relevant times, the pipelines were owned by the United Texas Transmission Company (UTTCO). Their relocation was required to conform with a project to widen and deepen the bayou. This project

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[1] District Judge of the Western District of Louisiana, sitting by designation.

was a joint endeavor of Jefferson County Drainage District NO. 6 (Drainage District) and the Corps. UTTCO refused the Corps' order to relocate the lines until UTTCO received assurances that it would receive reimbursement for costs and expenses of relocation. In turn, the Corps revoked UTTCO's permits to cross under the bayou, a navigable stream, and this litigation ensued.

The district court granted summary judgment in favor of the Corps and the Drainage District, holding that UTTCO could be compelled to pay for the entire relocation of the pipelines under the permits. The court also held that, in the face of UTTCO's refusal to comply with the Corps' order to relocate the pipelines, the Corps' revocation of UTTCO's permits was not an abuse of its discretion. Even though we view the case in a different manner than did the district court, we affirm.

I

FACTS AND PROCEDURAL HISTORY

Historically, Southeast Texas in general and Jefferson County in particular have been plagued by destructive floods. Man's attempts to alter drainage patterns in the area have been legion but less than wholly successful. Specifically, since 1912, numerous efforts have been instituted to curb the problems resulting from the flooding of the bayou.

The instant widening and deepening project was instituted under the aegis of the Flood Control Act of 1965, which authorized many such projects throughout

the country.[2] These projects are conducted as joint efforts between local sponsors, such as the Drainage District (with local funds furnished for the particular improvement), and the Corps (with funds appropriated by Congress).

In 1972, the United States and the Drainage District entered into a "Local Cooperation Agreement." Under that agreement, the Drainage District was to work with the Corps and was to provide all the necessary lands, easements, and rights of way necessary for the project. In addition, the Drainage District agreed to make "all necessary alterations and relocations of structures and utilities" that were necessary for the project.

In 1951 and 1956, UTTCO's predecessor in ownership of the pipelines was granted permits from the Corps to lay two gas pipelines under the bed of the bayou. When UTTCO acquired the pipelines it succeeded to these permits (and to easements across lands abutting the bayou – lands through which portions of the pipelines ran). The permits were issued by the Corps pursuant to § 10 of the Rivers and Harbors Act of 1899 (hereafter, § 10 permits). The language of ¶ (*f*) of the instant § 10 permits is relevant to our inquiry. That paragraph provides, in pertinent part:

> (*f*) That if the future operations by the United States require an alteration in the position or the structure or work *herein authorized* . . . the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions

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[2] P.L. No. 89-298, 79 Stat. 1073 (Oct. 27, 1965).

> caused thereby without expense to the United States. . . . [3]

The scope of the Corps' authority under ¶ (*f*) to demand relocation of the pipelines at the expense of the permit holder is at the heart of this lawsuit.

In 1987, UTTCO was informed by the Corps that the pipelines would have to be relocated to accommodate the flood control project. UTTCO instituted the preparation of a preliminary estimate of the cost of the necessary relocations. When the results were received, the Corps and the Drainage District were advised by UTTCO that it was prepared to go forward with the relocation as soon as it received assurance from the Drainage District that UTTCO would be reimbursed for the entire cost of relocation – approximately $1,060,000. Initially, the Corps agreed with UTTCO's assertion that the Drainage District was responsible for at least some of the cost of the pipeline relocations. Later, however, the Corps took the position (with the Drainage District) that, under the language of the permits, the Corps could require UTTCO to relocate the pipelines and absorb the entire cost.[4]

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[3] (Emphasis added).

[4] UTTCO has maintained throughout the course of this litigation that, when the Drainage District began to run low on funds, it developed the plan to have the Corps to use its perceived authority under the § 10 permits to force pipeline owners to absorb the costs of relocations, thereby relieving the District of its obligation to do so under the Cooperation Agreement provision for the District to provide easements and relocations. We are concerned here with the Corps' authority under § 10 permits and not why it may have chosen to exert that authority.

When UTTCO made clear that it was not prepared to relocate the pipelines without assurances of reimbursement, a stalemate developed. The parties corresponded and met frequently, each attempting to convince the other that it had to pay for the relocations. These efforts failed, however, with a result that the flood control project was delayed by UTTCO's unflagging refusal to relocate its pipelines until it received assurances of reimbursement.

In February 1989, the Corps notified UTTCO that its § 10 permits had been suspended and advised UTTCO of its right to require a public hearing. According to that notification, appropriate action on the permits – which could include reinstatement, modification, or revocation – would be taken only after such a hearing (if one were requested). The public hearing was held in June 1989. The principal matter discussed was whether the Corps' use of its asserted authority to force UTTCO to move its pipelines at its own expense would be in the "public interest." UTTCO continued to refuse to bear the relocation cost, arguing that the Corps had no authority to order such a relocation. UTTCO also continued to maintain that under the Cooperation Agreement the Drainage District was obligated to pay for any required relocations.

After the public hearing but before the Corps took formal action on the permits, UTTCO filed the instant lawsuit, naming the Corps and the Drainage District as defendants. The lawsuit was filed in July 1989, and in it UTTCO sought monetary, injunctive, and declaratory relief. Essentially, UTTCO sought a determination that it could not be forced by the Corps to pay for the relocation of the pipelines.

In August 1990, over a year after this suit was filed, the Corps formally considered the status of UTTCO's § 10 permits. The Corps noted that UTTCO had been notified repeatedly of the need to relocate the pipelines, but that UTTCO had consistently refused to comply. The Corps also asserted that it had authority to revoke the permits of a recalcitrant permit holder such as UTTCO, citing a string of precedents which held that a permit holder does not have a vested interest in the permit. As for UTTCO's argument that the Corps had no authority to order relocation of facilities situated outside the boundaries of the stream as they existed when the § 10 permits were issued, the Corps found:

> The permits do not provide that future operations be within the stream bed of the Hillebrandt Bayou, or that the owner must be given assurance of compensation for such pipeline relocation on the fastlands [i.e., the lands outside of the original stream banks]. On the contrary, permit conditions state that the owner will be required to remove or alter the structural work for future operations without expense to the United States.

The Corps then revoked the permits, issuing its opinion on August 13, 1990.

The district court granted summary judgment in the instant case in August 1991. In its opinion, the court stated that "no dispute whatsoever exists as to the facts involved in the claims upon which summary judgment is granted."[5] That court found – at least implicitly – that

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[5] *UTTCO v. Corps*, 772 F.Supp. 952, 954 (E.D.Tex.1991).

some parts of the pipelines which had to be relocated lay inside the original boundaries of the streams and other parts of the pipelines which had to be relocated lay outside of those boundaries.[6] The court then held that UTTCO could be forced to pay the costs of accomplishing the required relocations of parts of the pipelines, including parts located outside the original banks of the bayou. Specifically, the court held that the work outside the original banks was incidental to the work inside the original banks, and that UTTCO could thus be forced to pay for the entire relocation.[7] The court also held that, inasmuch as UTTCO had improperly refused to obey the Corps' order to relocate the pipelines, the Corps was authorized, under the language in ¶ (*f*) of the § 10 permits, to revoke the permits and order the pipelines removed.

The district court summarized its view of the case and the arguments that UTTCO was making, stating:

> [T]his court opines that apparently the plaintiff pipeline owner here wishes to reap the benefits of conducting business over navigable waterways, without bearing any of the burdens. The court assumes the pipelines were constructed over the Hillebrandt Bayou because that was the most direct and profitable route for the transmission of natural gas. For over thirty

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[6] That court stated that "UTTCO has agreed that it is possible it does not have a claim against the federal government for the costs of relocating those parts of the pipelines located within the navigable waterway."

[7] *Id.* (quoting and discussing *United States v. 597.75 Acres of Land*, 241 F.Supp. 796, 799 (W.D.La.1965)).

> years, pipeline owners have been profiting from the federal government's generous permission to cross a navigable waterway. Now flood control for a substantial portion of southeast Texas is at stake, and the plaintiff wants the taxpayers to subsidize its relocation of its pipelines so the plaintiff can profitably transmit natural gas. Not only is such a position not good law, it is not good sense.[8]

The court denied UTTCO's summary judgment motion, granted those of the Drainage District and Corps, and ordered removal of UTTCO's pipelines. UTTCO timely appealed. We are advised that during the pendency of this appeal, both of UTTCO's pipelines were removed from the bayou and were not re-installed.[9]

II

ANALYSIS

As all must know by now, we review the record on appeal from a district court's grant of summary judgment "under the same standards which guided the district court."[10] The standards we apply are set out in the Supreme Court trilogy of *Anderson v. Liberty Lobby, Inc.*,[11]

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[8] 772 F.Supp. at 955.

[9] A letter filed jointly by the parties on June 10, 1993, at our request, confirms our understanding that the removal of UTTCO's pipelines was completed by July 1992, before argument was heard on this appeal, but after the parties' briefs were filed with this court.

[10] *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir.1988).

[11] 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Celotex Corp. v. Catrett,[12] and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[13] In our review of this case, we consider two issues of law: whether UTTCO could have been forced to absorb the entire cost of relocating its pipelines if it had done so; and whether the Corps abused its discretion in revoking UTTCO's § 10 permits after UTTCO refused to relocate sections of its pipelines as ordered by the Corps.

A. *Responsibility for Relocation Costs*

1. *Types of Relocation Orders and Responsibility for Costs*

There are essentially four factual situations that could be encountered when the Corps orders relocation of pipelines running under a navigable stream pursuant to a § 10 permit. The orders could require relocation of pipelines (1) wholly within the original banks of the stream; (2) wholly outside the original stream banks (e.g., when a stream is widened but not deepened, or at least not enough to require relocation of the portion of the pipeline lying beneath the original stream bed); (3) almost entirely inside the original stream banks but with some incidental involvement of relatively insignificant

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[12] 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[13] 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

portions of the pipeline or related facilities located outside the original boundaries; or (4) both inside *and* outside the original stream banks, with substantial work in each area.[14]

Under our interpretation of the permit language, the correlative rights and obligations of the permit holder and the Corps differ significantly, depending on which type of relocation situation is implicated in the particular order. As the question whether the Corps properly revoked UTTCO's permits is dependent on the specific rights and duties that appertain under the type of relocation that is encountered in the instant § 10 orders, we shall first elaborate seriatim on the particular rights and duties that flow from each of the four possible types of relocation.

a) Wholly within the Original Banks of the Bayou

As noted above, one of the aspects of this litigation which is not disputed is that permit-holders must pay for the movement of any portion of a pipeline that is located within the original permit area. The cases relied on by UTTCO in its brief to this court and its representations at oral argument confirm acknowledgement of this proposition. Solely for the sake of clarity and perspective, then, we reiterate the truism that the pipeline owner must bear

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[14] For reasons explained below, a fifth possible way that the Corps could order relocation of a pipeline – a relocation outside of the original banks of the stream that would have an incidental effect inside the original banks – will be grouped with the fourth possibility for purposes of this analysis.

the cost of relocation work within the original permit area, i.e., the boundaries of the bayou existing when the § 10 permits were granted.

In *Tenneco, Inc. v. Greater LaFourche Port Commission*,[15] on which UTTCO principally relies, we stated:

> Tenneco agrees that it is financially responsible for pipeline alterations necessary to accommodate changes in the channel that are made within the right of way purchased from the State – that is, changes within the bayou's original boundaries. Tenneco objects to paying for those changes occasioned by the channel's encroachment onto [the abutting owner's] property and onto Tenneco's easement there.[16]

UTTCO attempts to align itself with Tenneco. In discussing *Tenneco* and *United States v. 597.75 Acres of Land*[17] in its brief to this court, UTTCO states that "when a pipeline owner is compelled to relocate a portion of its pipeline *within the permitted area* (i.e., the portion lying between the banks of the waterway at the time of permit issuance) pursuant to a permit condition, then any relocation of portions of the pipelines lying outside the permitted area cannot be the subject of a claim for compensation when the latter is merely incidental to the required relocation within the Bayou." If nothing else, then, UTTCO agrees with the principle that the pipeline owners must pay for alterations to portions of the pipelines within the bayou's channel as it existed when the § 10 permits were granted;

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[15] 427 F.2d 1061 (5th Cir.1970).

[16] *Id.* at 1064.

[17] 241 F.Supp. 796 (W.D.La.1965).

UTTCO simply insists that *all* alterations necessitated by the instant relocation orders were to portions of the pipelines located outside the original boundaries of the bayou, and therefore must be paid for by the Drainage District – or at least not by UTTCO.[18] The pipeline owner's responsibility for all costs of relocation inside the permit area derives from the language of ¶ (*f*) of the permits. That paragraph states that "if future operations of the United States require alteration in the position of the structure or work *herein authorized*, . . . the owner will be required to remove or alter the structural work or obstructions caused thereby without expense to the United States."[19] This permit language clearly gives the Corps[20] the authority to order the relocation of the

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[18] This point was made by UTTCO even more explicitly in its response to the Corps and the Drainage District's motions for summary judgment. UTTCO argued:

> Further, UTTCO never refused to relocate the pipelines without expense to the United States. Though [sic] not required to do so by the permit itself, UTTCO in fact expressly agreed to relocate portions of its pipelines within the Bayou that needed to be relocated (if any) *at its own expense*. UTTCO also agreed to relocate even the portions of the pipelines lying *outside* the Corps' jurisdiction in privately owned fastlands at no cost to the federal government, provided that the Drainage District provide assurance that it would [pay for the relocations].
> (Footnote omitted).

[19] (Emphasis added).

[20] At oral argument, counsel for UTTCO argued that this flood control project is local and thus is not a "future operation[ ] of the *United States*." We disagree. This project was primarily for the benefit of the citizens of the area, but certainly there is flood control benefit beyond the immediate region of the Hillebrandt

pipelines inside the boundaries of the original permit area at the expense of the pipeline owners. As stated before, this is not in dispute; only relocations in the areas outside of the original banks of the bayou – the abutting lands through which the pipeline owner had acquired private easements – is disputed in the instant case. As noted, UTTCO insists that no relocation was required between the banks of the bayou as they existed at the times the permits were issued.[21]

b) Wholly outside the Original Banks of the Bayou

The Corps and the Drainage District argue that, pursuant to the Corps' authority under the § 10 permits, it may order the relocation of pipelines in areas outside the original boundaries of the bayou as well as the area within those boundaries, i.e., between the original banks; and that these relocations too must be made without cost to the government. We do not agree. The clear language of the permits that the Corps issued to UTTCO's predecessor limits the permit's coverage to the "work herein authorized" – i.e., the work authorized by the permits within the original bounds of the bayou. Thus, the language of the permits literally limits the Corps' authority to impose the costs of relocation on the holder of the permits to those costs properly allocated to relocation

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Bayou. That this project is a "future operation of the United States" is evidenced by its authorization by act of Congress, substantial funding coming from the federal government, and the work of the Corps on the project.

[21] *But see* section II.A.2., *infra*.

work in the area between the banks of the bayou as they existed at the time the permits were granted.

In the alternative the Corps and the Drainage District argue that the costs of relocation work outside the original banks can properly be assessed to permit holders under the "navigational servitude" possessed by the government. In their briefs to this court both the Corps and the Drainage District cite several cases that discuss the expansive powers of the federal government under the navigational servitude.[22] In addition, the parties argue at length about whether "navigation" per se is a requisite to invoking that servitude, and whether the work involved in this project is properly viewed as implicating "navigation."

The "navigational servitude" is an aspect of the sovereignty of the United States, "grounded in the power of the Federal Government to regulate commerce,"[23] entitling the government to exert a dominant servitude in all lands below the ordinary high water mark of navigable streams.[24] As noted in *Coastal Petroleum Co. v. United States*, "[t]his navigation servitude is an extremely old

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[22] *See United States v. Alaska*, ___ U.S. ___, 112 S.Ct. 1606, 118 L.Ed.2d 222 (1992); *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707, 107 S.Ct. 1487, 1491, 94 L.Ed.2d 704 (1987); *United States v. Twin City Power Co.*, 350 U.S. 222, 224, 76 S.Ct. 259, 260, 100 L.Ed. 240 (1955); *Lambert Gravel Co. v. J.A. Jones Constr. Co.*, 835 F.2d 1105, 1110 (5th Cir.1988).

[23] *Lambert Gravel*, 835 F.2d at 1110 (quoting *Coastal Petroleum Co. v. United States*, 524 F.2d 1206, 1210, 207 Ct.Cl. 701 (1975)).

[24] *See Cherokee Nation of Okla.*, 480 U.S. at 704, 107 S.Ct. at 1489.

concept – owners of property or property rights *within navigable waters* take those rights fully cognizant of their limited nature."[25] One facet of the situation at issue in this case – that concerning portions of pipelines situated outside the original river banks – is by definition not *within navigable waters* and thus cannot be subject to the servitude. We find the question whether the project involved navigation to be irrelevant to our consideration. Even if we were to find the navigational servitude applicable, the Corps would still not here be authorized to assert the servitude outside the original banks of the bayou and therefore cannot order UTTCO to bear the expense of relocating those portions of the pipelines not located between the original banks of the bayou.

UTTCO held easements on the private lands (the "fastlands," i.e., those lands that are contiguous to but outside the original banks of the bayou) under the surface of which the pipelines passed. The instant project involved both (1) *deepening* the original permit channel, thereby affecting that section of pipelines lying in that portion of the bed of the bayou situated between the original banks, and (2) *widening* the bayou, thereby affecting substantial portions of the pipelines lying outside and on either side of the original banks. The proposition that the navigational servitude extends beyond the original banks of the stream (outside the navigable waters of the

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[25] 524 F.2d 1206, 1209, 207 Ct.Cl. 701 (5th Cir.1975) (emphasis added) (citing *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808, 70 S.Ct. 885, 890, 94 L.Ed. 1277 (1950), and *Gibson v. United States*, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996 (1897)).

United States) is insupportable – as is the "bootstrap" proposition that the very act of widening the bayou brings "within navigable waters" the land previously lying outside the original banks but affected by the widening, thereby making it subject to the servitude retroactively.

The *land* outside the banks was not *taken* by exercise of the navigational servitude so that the bayou could be widened (for it could not have been), but was purchased from the landowners. In fact, title to that land was acquired *subject to* UTTCO's own pipeline easements! There is no merit to the Corps' argument that it can simply take private property rights (here, UTTCO's easements across private riparian property) that are not subject to a navigational servitude without compensating the owner for the property right thus taken. Yet that would be the precise result if we were to allow the Corps to obliterate UTTCO's easements on the fastlands by (1) acquiring those lands from private owners, (2) widening the bayou to encompass those lands, and (3) applying the navigational servitude thereto retroactively for purposes of forcing owners of pre-existing easements, such as UTTCO, to relocate their pipelines and other facilities at those owners' cost.

Unlike its non-property right in the permits to cross the bayou, UTTCO's easements in private property contiguous to the bayou but outside the banks do constitute property rights. Here, UTTCO does not contest the Corps' ability to order the relocation of portions of the pipelines that are situated in the fastlands and must be moved to accommodate the widening of the bayou; UTTCO (like any farmer whose property is burdened by UTTCO's

easement and lies in the way of the widening project) simply asks for compensation for the costs it will incur in relocating its pipelines within the affected areas.

c) Relocation Outside the Banks that is Incidental to Relocation Inside the Banks

As we have observed, no one seriously contests the rule that the cost of relocating the portion of a pipelines [sic] lying between the original banks of the bayou (i.e., the work that was either "herein authorized" under ¶ (*f*) of the permits or covered by the navigational servitude) must be borne by the pipeline owner. On the other hand, when the project requires the relocation of portions of the pipelines lying not between the original banks but in easements in the fastlands, the relocation costs generally must be borne by the appropriating governmental unit. We say *generally*, however, because there is one recognized exception: When the permit holder is required to relocate its facilities between the original banks of the waterway at no cost to the government, the permit holder will also be responsible for those costs incurred for work outside the original banks when such work is only incidental to the alterations required to be made between the original banks.

In *597.75 Acres*,[26] the district court stated that "a reasonable interpretation [of the permits] would also require that such incidental work on adjoining lands as is necessary to accomplish [the relocation within the waterway's banks] be effected at [the permit holders']

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[26] 241 F.Supp. 796.

expense."[27] In *Tenneco*, we elaborated on this point, stating that incidental alterations include "changes the pipeline company must make "necessary to accomplish [the] purpose' of relocation within the riverbed."[28] We continue to recognize this exception, first discussed in *597.75 Acres* and reiterated in *Tenneco*. In other words, when a project requires relocation work to be done principally within the original boundaries of the stream (the work "herein authorized" by the permits or within the bounds of the pre-existing navigational servitude) but some incidental work must be done in adjacent areas outside the banks as well (as a consequence of the work required inside the banks), the permit holders will be responsible for the entire cost of relocation of the pipelines.

d) Substantial Relocation Both Inside and Outside the Permitted Area

The final situation that might be involved when the Corps orders relocation is that in which the permit holder might be required to make substantial relocations of portions of the pipelines both within and without the original banks of the stream. We today hold that when the scope of the government project requires substantial work (as distinguished from incidental work), not only within the original banks but outside as well, the sponsoring governmental agency or subdivision shall be

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[27] *Id.* at 799.

[28] 427 F.2d at 1066 (quoting *597.75 Acres*, 241 F.Supp. at 799).

responsible for all reasonable costs incurred by the permit holder in relocating those portions of its facilities situated outside the original permit boundaries, i.e., outside the original stream banks. Of course, the permit holder will remain responsible for the costs attributable to the relocation work within the permit area.

This result flows naturally from the reasoning set forth in the foregoing analysis of the first three types of relocation orders. In fact, it is the corollary implicit in the "incident of work" rule of *Tenneco* and *597.75*. On one end of the spectrum, the language of ¶ (*f*) of the § 10 permits clearly allows the Corps to force the pipeline owner to bear the cost of relocations inside the original riverbanks. On the other end, the government is clearly obliged to pay the expense of substantial relocations wholly outside the original banks. Obviously, each such case will require a factual determination concerning what portion of the relocation costs pertains to the work within the original permit area and what portion pertains to the work outside that area, for the expenses shall be borne accordingly. Only when essentially all relocation work is between the banks of the stream will the permit holder be responsible for costs attributable to outside work, and then only for that which is truly incidental to the bulk of the project, i.e., that within the banks. We caution, however, that no such "incidental" exception exists for the obverse situation in which the relocation order requires work on facilities situated almost wholly outside the stream banks. In such situations the permit holder remains responsible for costs attributable to *any* work between the stream banks, no matter how incidental, given the permit's language.

2. *The Type of Relocation Situation Involved Here*

At oral argument to this court, counsel for UTTCO represented several times that all of the alterations to the pipelines involved in the instant case were to occur outside of the original permit area; that no portions of the pipelines lying within the banks of the bayou would be affected.[29] After a thorough review of the record, however, we find that assertion contradicted by (1) the evidence presented to the district court at the summary judgment hearing, (2) the findings made by the district court, and most importantly, (3) the findings of and evidence considered by the Corps in its proceedings for administrative revocation of the permits. Apparent from all of that – and contrary to UTTCO's assertions – are the conclusions that some portions of the required relocation work would necessarily involve segments of the pipelines situated under the bed of the bayou as it existed at the times the permits were granted, i.e., inside the original permit area, and that such work would be substantial, not merely incidental. The same is true of relocation work outside the original permit area. Thus, the type of relocation ordered is that described in subsection d) above: substantial relocation both inside and outside the permitted area. It follows inescapably, then, that UTTCO would have been responsible for all costs and expenses allocable

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[29] This has been UTTCO's contention throughout this litigation. For example, the footnote we omitted from UTTCO's response to the Corps' and the Drainage District's motion for summary judgment, *see supra* note 17, asserts: "In point of fact, no such relocation [inside the original banks] was ever required."

to work inside the original banks of the bayou, but would have been entitled to reimbursement from the Corps or the Drainage District – or both – for the costs and expenses allocable to relocation work outside the permit area.

From the underdeveloped summary judgment record, however, it appears that UTTCO never attempted to show precisely how much of the pipelines involved in the instant case lay within the original permit boundaries and how much lay outside those boundaries. Even less determinable at this juncture is just what fraction of the total relocation cost that UTTCO would have incurred if it had obeyed the relocation order of the Corps would have been allocable to the inside work and what fraction would have been allocable to the outside work.

B. *The Revocation of UTTCO's Permits*

In reviewing the Corps' revocation of UTTCO's permits, we must ask whether the Corps "acted in an arbitrary and capricious fashion, abused its discretion or otherwise acted not in accordance with law."[30] This inquiry in turn requires a review of the findings of the Corps and the record made by that agency. "If the agency decision cannot be sustained on the administrative record, then the case should be remanded to the agency for further consideration."[31]

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[30] *See Bowles v. United States Army Corps of Eng'rs*, 841 F.2d 112, 116 (5th Cir.1988) (citing 5 U.S.C. § 706(2)(A)).

[31] *Id.* (citing *Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973)).

The Corps revoked the permits because UTTCO refused to relocate the pipelines without assurances of compensation from the Corps or the District or both. In its Statement of Findings that accompanied the revocation orders, the Corps stated:

> The permits do not provide that future operations be within the streambed of Hillebrandt Bayou, or that the owner must be given assurance of compensation on the fastlands. On the contrary, permit conditions state that the owner will be required to remove or alter the structural work for future operations without expense to the United States.

Clear from the first part of this finding is the premise that if the facts revealed that some portions of the pipelines were within the permit area and those portions required relocation, the Corps would have the right to order such relocation at UTTCO's expense. It follows that if UTTCO then refused to comply with the Corps' relocation order, the Corps could not be found to have abused its discretion by revoking the permits.

Our inquiry thus must begin with the fact question whether the Corps had substantial evidence to determine that some of the required relocation work would necessarily occur within the original boundaries of the bayou. At oral argument, counsel for UTTCO asserted that the Corps had never made a finding that any of the alterations would have to be made inside the original banks of the bayou. In its findings, however, the Corps stated:

> The project specifications set out in the enclosure 25 are in accordance with the Corps' regulation . . . which requires pipelines to be at least

> five (5) feet below the bed *of the waterway*. Both of UTTCO's pipelines fall *within this safety zone*. Encl. 25. Thus, the Secretary of the Army has the authority to seek removal or alteration of the pipelines in accordance with condition (*f*).[32]

Enclosure 25 of the findings includes two plats of the pipelines. Those diagrams clearly demonstrate that a significant part of the pipeline relocation would occur within the original permit area.

In addition to the statement quoted above, we have located several other places in the findings of the Corps at which the fact is recognized, at least implicitly, that some of the required relocation work would be within the bayou's original boundaries.[33] Interestingly, the Corps' findings often quote correspondence from UTTCO in which it asserted a willingness to pay for alterations that it recognized needed to be made inside the original permit area.

Coupled with the clear fact that portions of the subject pipelines lay within the original banks of the stream bed (so that UTTCO's refusal to relocate those sections of

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[32] (Emphasis added).

[33] For example, discussing a letter UTTCO sent to the Corps in August 1988, the Corps noted in its findings that "UTTCO further stated that almost all of such costs arise from the proposed widening of the Hillebrandt Bayou, and that only a small portion of the area from which UTTCO was advised to relocate is within the boundaries of the Bayou, and then only as an incident to the widening of the Bayou." At another point in the Corps' findings, it discussed UTTCO's assertion that a partial relocation of the pipelines, of the portions of pipeline within the original boundaries, would be senseless.

the pipelines in compliance with the Corps order would justify revocation of the permits), is the undeniable (and undenied) proposition that the Corps has the absolute authority to order relocations in the fastlands too. This flood control project was authorized by Congress, and the Corps had the unquestionable authority to determine the specifications – including the new placement of UTTCO's pipelines – for implementation of the project. As noted above,[34] UTTCO has never questioned the Corps' authority to order relocation in the fastlands; instead, UTTCO has merely denied any obligation to pay for the relocations in those areas which, it asserted at different points in the litigation, comprised the entire relocations.

The inescapable picture that emerges is that UTTCO thus engaged in the strong-arm tactic of refusing to relocate its pipelines in the face of the clear authority of the Corps to order the relocation. UTTCO opted to play an unwarranted game of hardball when, without any legal right to do so, it demanded that the Drainage District assure reimbursement for the entire relocation costs – an allocation of costs that could never be correct in view of the fact that portions of the pipelines unquestionably were within the original stream bed. On the other hand, the Corps and the Drainage District were playing some hardball of their own: they were demanding that UTTCO bear the entire cost of relocating the pipelines even though substantial portions of the pipelines that had to be relocated lay in the fastlands, where UTTCO was not responsible for the cost of relocations.

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[34] *See supra* note 17.

If UTTCO had only complied with the Corps' order (even under formal protest), relocated the pipelines, and sued for compensation for the portions of its private easements that were taken and for the costs associated with the relocation in the fastlands, then under the reasoning set out above, UTTCO clearly would have been entitled to recover. UTTCO did not, however, follow this course. Instead, UTTCO delayed the project by demanding assurances of full compensation – to which it was not entitled – before it would begin work on the relocation. As it turns out, UTTCO's recalcitrance constitutes a valid cause for the Corps to revoke the § 10 permits. As UTTCO never challenged the Corps' authority to order the relocation, but nevertheless refused absolutely to relocate the pipelines, we cannot say that the Corps abused its discretion by revoking UTTCO's permits.

There is no provision of federal law to which UTTCO can point that would sanction the type of self help in which it engaged in this case. We have no choice, therefore, but to recognize that the Corps held the stronger hand (which it played with aplomb) and to affirm the district court's decision.

III

CONCLUSION

UTTCO does not – because it cannot – challenge the authority of the Corps to order relocation of UTTCO's pipelines to accommodate the subject drainage project. For the reasons set forth above, we have concluded that UTTCO was without legal justification in refusing to relocate its pipelines in response to those orders of the Corps.

Thus the Corps did not abuse its discretion in revoking UTTCO's § 10 permits.

As a consequence of those permit revocations, UTTCO lost the option to relocate its pipelines, leaving itself no alternative but to remove those portions, both within and without the original permit areas, that needed to be moved so that construction of the project could proceed. And, whether in recognition of the valid revocation of the § 10 permits by the Corps, or in compliance with the district court's judgment that is here being appealed, or for some other reason or reasons that are not apparent to us, UTTCO did in fact remove its pipelines from the bed of the bayou and from the fastlands.

Had UTTCO timely relocated its pipelines pursuant to the orders of the Corps, thereby preventing revocation of the § 10 permits that had allowed the pipelines to cross the bayou in the first place, UTTCO might have been successful in recovering, through the instant litigation, the costs incurred in relocating those portions of the pipelines that were situated outside the original stream bed – costs that clearly would not have been merely incidental to relocating the portions of the pipelines situated inside the original stream bed. But unfortunately for UTTCO, that was not the course of action it pursued; so we must affirm the judgment of the district court. In so doing, we do not speculate on any other remedies that UTTCO may even now retain against the Corps or the Drainage District.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TEXAS, BEAUMONT DIVISION

UNITED TEXAS TRANSMISSION CO. v.
UNITED STATES ARMY CORPS
OF ENGINEERS, ET AL

No. 1:90-CV-0511

772 F. Supp. 952; 1991 U.S. Dist. LEXIS 13849

July 11, 1991, Decided

HOWELL COBB, UNITED STATES DISTRICT JUDGE

On May 19, 1986, the United States Army Corps of Engineers, Galveston District (the Corps) notified United Texas Transmission Company (UTTCO) that a proposed drainage and flood control project would require relocation and alteration of two of UTTCO's pipelines. A disagreement arose between the Corps and UTTCO over who would have to bear the cost of such relocation and alteration. On July 20, 1989, in the Southern District of Texas, UTTCO filed suit against the Corps and other defendants, seeking assorted declaratory, injunctive, and monetary relief. That case was transferred to this court, and all parties have now filed motions for summary judgment. This court now rules on those motions.

THE FACTS

No dispute exists as to the underlying facts of this case. UTTCO is a Texas intrastate transmission company which owns and operates natural gas pipelines throughout Texas. Two of those pipelines cross Hillebrandt

Bayou, in Jefferson County, Texas. Those pipelines are known as the Index 128-20" pipeline (the 20" pipeline) and the Index 300-16" pipeline (the 16" pipeline).

UTTCO's predecessors in title to the 20" pipeline and the 16" pipeline had obtained permits from the Corps to construct those pipelines across Hillebrandt Bayou. Hillebrandt Bayou is a navigable stream within the meaning of Section 10 of the Rivers and Harbors Act, 33 U.S.C. @ 401 et seq., and therefore within the jurisdiction of the Corps. The permit for the 20" pipeline was issued November 19, 1951, and is permit number 1728. The permit for the 16" pipeline was issued March 18, 1957, and is permit Number 3779.

UTTCO's predecessors in title additional acquired various easements andrights-of-way [sic] from the owners of fastlands adjacent to the Hillebrandt Bayou. The pipelines were then constructed. UTTCO later succeeded to title to the pipelines. To this day, UTTCO continues to own and operate the 20" pipeline and the 16" pipeline.

Meanwhile, the United States Congress passed the Flood Control Act of 1965. PUB. L. 89-298, 79 Stat. 1073 (Oct. 27, 1965). This Act included a project known as the Taylors Bayou Flood Control Product (the Project). This project was a joint project with Jefferson County Drainage District No. 6 (the District). A local cooperation agreement to the effect was signed by the Corps and the District in 1972. Construction of the project began in August 1982.

As previously stated, in May 1986, the Corps notified UTTCO the 20" pipeline and the 16" pipeline would have

to be relocated and altered to allow completion of the project. For approximately two years, construction continued on other parts of the project while the Corps, the District, and UTTCO argued over who should pay the costs associated with the necessary relocation and alteration of the 20" pipeline and the 16" pipeline. Finally, in the summer of 1988, UTTCO advised the Corps it refused to relocate or alter the pipelines at issue unless it was guaranteed compensation for the costs of the relocation or alteration.

In response to UTTCO's refusal to remove or relocate the pipelines,the [sic] Corps suspended Permits #1728 and #3799, effective February 14, 1989. The Corps notified UTTCO it had the right to request a public hearing, and that following such a hearing, the permits could be reinstated, modified, or revoked. UTTCO requested a public hearing.

The hearing was held June 28, 1989. This lawsuit was filed July 20, 1989, inthe [sic] Southern District of Texas, complaining of the suspension of the permits. On August 13, 1989, the Corps revoked the permits. UTTCO's complaint in this suit was then amended to include the revocation of the permits. On July 19, 1990, the lawsuit was transferred to the Eastern District of Texas and assigned to this court.

THE LAW

First the court notes that summary judgment is only appropriate where no genuine issue of material fact exists, and the moving party is entitled to summary judgment as a matter of law. FED. R. CIV. P. 56; Anderson v.

Liberty Lobby, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In this case, no dispute whatsoever exists as to the facts involved in the claims upon which summary judgment is granted. The only determination this court must make is whether any of the moving parties are entitled to summary judgment as a matter of law. The issues of law involved in all three motions for summary judgment are the same, so the court will analyze them just once, and then indicate its ruling on each motion.

The dispute which engendered this lawsuit presented a single question: what entity is responsible for paying to relocate or alter pipelines constructed in an area that is now the subject of a federal flood control project? The claims upon which summary judgment is sought still present only that question. The answer is clear: The pipeline's owner, who holds the permits, must pay for relocation or alteration of the pipelines, upon demand by the Corps pursuant to administration of a federal flood control project. This is clear for three reasons.

First, the permit for each pipeline states unequivocally:

> (f) that if future operations by the United States require an alteration in the position of the structure or work herein authorized (the pipeline), or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States . . . . No claim shall be made against the United States on account of any such removal or alteration.

This language should have given clear notice to UTTCO that its claim against the Corps is untenable. It is obvious that a federal flood control project is an "operation [sic] of the United States," and it is undisputed that the Corps gave UTTCO "due notice" of the need for relocation or alteration of the pipelines.

Second, the case law interpreting the language of permits identical to those at issue in this case is also clear. "There is nothing novel or unconstitutional in the requirement that the defendants [pipeline owners] relocate pipelines they constructed in and across the bed of a navigable river." United States v. 597.75 Acres of land, more or less, situate in St. Martin Parish, State of Louisiana, 241 F. Supp. 796, 799 (W.D. La. 1965). A pipeline owner must comply with its permit terms. Id.

Third, this court opines that apparently the plaintiff pipeline owner here wishes to reap the benefits of conducting business over navigable waterways, without bearing any of the burdens. The court assumes the pipelines were constructed over the Hillebrandt Bayou because that was the most direct and profitable route for the transmission of natural gas. For over thirty years, pipeline owners have been profiting from the federal government's generous permission to cross a navigable waterway. Now flood control for a substantial portion of southeast Texas is at stake, and the plaintiff wants the taxpayers to subsidize its relocation of its pipelines so the plaintiff can continue to profitably transmit natural gas. Not only is such a position not good law, it is not good sense.

UTTCO has agreed that it is possible it does not have a claim against the federal government for the cost of relocating those parts of the pipelines located in the navigable waterway. It has adopted two alternative positions based on that possibility.

First, UTTCO argues that it still has a claim for the costs of relocating or altering those parts of the pipelines which cross the fastlands. This court, however, agrees with the opinion of the court ruling upon 597.75 Acres:

> The permits under which the pipeline crossings were made recognize and require that the relocation be made at defendants' [pipeline owners] expense, and . . . a reasonable interpretation thereof would also require that such incidental work on adjoining lands as is necessary to accomplish this purpose be effected at defendants' expense.

597.75 Acres, 241 F. Supp. at 799. UTTCO cannot prevail against the federal government on its claim for costs of relocation on the fastlands.

Second, UTTCO argues that the District, since it is not a federal entity, should pay the entire cost of the relocation or alteration. UTTCO relies on the 1972 cooperation agreement to support this argument. This court believes a reasonable interpretation of that agreement only requires that the District pay to acquire those rights-of-way or easements that are not acquired through the power of the Corps, the District's partner, and jointly responsible for execution of the Congressional mandate that the project be completed.

As this opinion makes clear, the Corps was within its jurisdiction to order the revocation of the permits. UTTCO cannot receive compensation from the District for any damages UTTCO may suffer as a result of the Corps' lawful action in proceeding with a federal flood control project. The District cannot be penalized for the fact that the Corps has jurisdiction over Hillebrandt Bayou.

Pursuant to this opinion, therefore, this court enters an order of this date,

DENYING plaintiff's motion for partial summary judgment;

GRANTING the motion of the Corps and individual federal defendants for summaryjudgment [sic] except as to Count 8 of the first amended complaint and the federal defendant's counterclaim;

GRANTING the motion of the District and individual local defendants for summary judgment except as to the local defendants' counterclaim;

ORDERING removal of the pipelines pursuant to the valid revocation of the permits;

ORDERING the severance of Count 8 of the first amended complaint and all defendant's counterclaims for separate trial.

SIGNED this 11th day of July, 1991.

APPENDIX E

CASES I-2099 AND I 2100

STATEMENT OF FINDINGS

I. FACTS

1. *Permittee.* Permit 1728 (I-2099) was issued to United Gas Pipe Line Company on 13 November 1951. Permit 3779 (I-2100) was issued to Humble Oil and Refining Company on 18 March 1957. The current owner of both pipelines is United Texas Transmission Company (UTTCO), 3200 Southwest Freeway, Post Office Box 4758, Houston, Texas 77210-4758.

2. *Project Description and Location.* The structure authorized by Permit 1728 consists of a 20-inch natural gas pipeline placed beneath Hillebrandt Bayou at a location approximately 1,000 feet north of FM 365 (Corps of Engineers Station 95+19). The structure authorized by Permit 3779 consists of a 16-inch pipeline also placed beneath Hillebrandt Bayou. The pipeline is located approximately 2,500 feet south-southeast of the intersection of Broussard and Humble Roads (Corps of Engineers Station 312+38). Both pipelines are in Jefferson County, Texas.

3. *Background Information.*

On 13 November 1951, the Department of the Army issued Permit 1728, which authorized, subject to permit conditions, a 20-inch pipeline across Hillebrandt Bayou, Jefferson County, Texas, upon the recommendation of the Chief of Engineers and under the provisions of Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. Section 403). Encl. 1. Among the permit conditions were the following:

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonable free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage. *Id.*

On 18 March 1957, the Department of the Army issued Permit 3779, which authorized, subject to permit conditions, a 16-inch pipeline in Hillebrandt Bayou, Jefferson County, Texas, upon the recommendation of the

Chief of Engineers and under the provisions of Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. section 403). Encl. 2. Among the permit conditions set forth in Permit 3779 were the identical conditions (f) and (g) as in Permit 1778, cited above. *Id.*

Both Permits also contain the language, "It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges. . . . Encl. 1 and 2.

On 27 January 1972, the Construction Operations Division of the Galveston District published a permit regulation pertaining to construction or work in and adjacent to navigable waters of the United States. Encl. 2a. Paragraph 3(e) sets forth the clearance requirements for submarine pipelines and cables. *Id.* In shallow draft channels the policy is to require that such lines be a minimum of five (5) feet below the bed of the waterway. This regulation was written in terms of a minimum requirement so that, for safety reasons, a greater depth could be required. *Id.* An enclosed list of the required minimum clearances for projects existing in January 1972, requires depths of between 4 and 30 feet with all but 3 projects requiring at least 6 feet. Lateral clearances are uniformly 25 feet. *Id.* By letter of 23 February 1987 (encl. 6), UTTCO was instructed that if their lines were not five feet below new project depths, thus requiring a relocation, new clearances of 10 feet vertical and 25 feet horizontal would be required. This is fully consistent with the 27 January 1972 Regulation and District practice.

On 22 August 1972, the United States of America and Jefferson County Drainage District No. 6 entered into the

Taylors Bayou Flood Control Project Local Cooperation Agreement. Encl. 3. This Agreement was authorized by the Flood Control Act of 1965, P.L. 89-298, 79 Stat. 1073 (27 October 1965). *Id.* Pursuant to this agreement, the United States and Jefferson County Drainage District No. 6 agreed to cooperate in the construction of a drainage and flood control project; which involved realigning, widening and deepening portions of Taylors Bayou, Hillebrandt Bayou, Pevitot Bayou, Willow Marsh Bayou, and Bayou Din. *Id.*, Encl. 4.

By letter dated 19 May 1986, the Corps notified UTTCO that the Taylors Bayou, Texas, Drainage and Flood Control Project involved realigning, widening, and deepening portions of the Hillebrandt Bayou portion of the project, and that UTTCO was believed to own pipelines crossing Hillebrandt. Encl. 4. The Corps advised UTTCO it planned to begin construction of the Hillebrandt Bayou portion from the mouth of Station 350+00 in December 1986 and the remaining portions of the project in December 1987, and requested information from UTTCO regarding its pipelines. *Id.*

By letter dated 10 October 1986, the chairman of the Jefferson County Drainage District No. 6 reaffirmed its obligations to the Corps under the Local Cooperation Agreement. Encl. 5.

In a letter dated 23 February 1987, the Corps notified UTTCO that the enlargement of Hillebrandt Bayou from Taylors Bayou to a point approximately 6.6 miles upstream was scheduled to be advertised for bids in January 1988 with contract award for March 1988. Encl. 6. UTTCO's pipelines would have to be lowered by March

1988. UTTCO was further advised that the Bayou enlargement is a Federal project in navigable waters of the United States, and is to be accomplished at no cost to the Government by virtue of permit conditions which authorized the pipelines under Section 10 of the Rivers and Harbors Act of 1899, and the navigation servitude of the Commerce Clause of the U. S. Constitution. *Id.*

In a 8 March 1988, letter, UTTCO advised Jefferson County Drainage District No. 6 and the Corps that UTTCO's 20-inch (Corps Permit 1728) and 16-inch (Corps Permit 3779) pipelines would be affected by the widening operations. Encl. 7. UTTCO stated it expected to be reimbursed 100 percent ($1,060,000.00 estimate) of the actual cost to adjust its pipelines to accommodate the project. *Id.* UTTCO indicated that it would schedule adjustments to its pipelines after receipt of authorization for reimbursement from the Drainage District. *Id.*

Jefferson County Drainage District, No. 6, in a letter dated 22 March 1988, replied to UTTCO's 8 March 1988 letter, stating that it declined to reimburse UTTCO. Encl. 8.

On 14 April 1988, a meeting was held between Mr. Mark Bounds of UTTCO and representatives of the Corps to discuss engineering aspects of relocation of the pipelines. Encl. 9.

The Corps advised UTTCO, in a letter dated 20 April 1988, to proceed with relocation of its pipelines as soon as practicable. Encl. 10. The letter stated as follows:

> The data that you have furnished on the 20-inch pipeline clearly show that it will have to be relocated. A shift in the channel alignment

> would not help and, according to Mr. Bounds, lowering the existing line is not feasible. The new line should be located at least 10 feet below the design channel bottom in accordance with the February 23, 1987 letter.
>
> The data that you have furnished on the 16-inch pipeline indicate that it does not have the necessary 5 feet of cover and will have to be adjusted. Lowering the existing line may be an economical alternative to relocation. Five feet of cover will be acceptable if the existing pipeline can be lowered; however, if the pipeline is removed and a new one installed, 10 feet of cover will be required as per our February 23, 1987 letter. You are requested to proceed with the adjustments to your pipelines as soon as practicable. *Id.*

In a 5 July 1988 letter, the Corps again informed UTTCO that its pipelines were an obstruction to the Federal project and must be relocated. Encl. 11. UTTCO was informed that because the pipelines were placed within a navigable channel, pursuant to a Section 10 permit, the United States navigational servitude would preclude liability for the payment of compensation for changes within or incidental to the navigable channel. UTTCO was further informed Federal authority would be exercised to compel the relocation. *Id.*

On 13 July 1988, UTTCO responded to the Corps' 5 July 1988 letter stating its willingness to relocate its pipelines after it received assurances it would be compensated for all costs associated with the relocations. Encl. 12.

In a letter dated 20 September 1988, UTTCO stated that it was legally entitled to compensation for most of the more than $1,000,000.00 estimated actual costs it would incur in relocating its pipelines to accommodate the Hillebrandt Bayou flood control project. Encl. 13. UTTCO further stated that almost all of such costs arise from the proposed widening of the Hillebrandt Bayou, and that only a small portion of the area from which UTTCO was advised to relocate is within the boundaries of the Bayou, and then only as an incident to widening the Bayou. *Id.*

On 13 February 1989, the Corps in the Case I-2099 (Permit 1728, 20-inch line) Statement of Findings determined that UTTCO's refusal to lower the pipeline was delaying completion of the Federal project. Encl. 14. The Findings noted that the Corps repeatedly advised UTTCO to relocate its pipelines, but that UTTCO refused to relocate unless compensated for its expenses. *Id.* As a result, the District Engineer, Colonel John A. Tudela, found that pursuant to condition (f) of Permit 1728 and 33 C.F.R. 325.7(c), the public interest would best be served by suspension of the permit upon written notification of the permittee. *Id.*

Likewise, on 13 February 1989, the Corps in Case I-2100 (Permit 3779 16-inch line) Statement of Findings determined that UTTCO's refusal to lower the pipeline was delaying completion of the Federal project. Encl. 15. Again, the Findings noted that the Corps repeatedly advised UTTCO to relocate its pipelines, but that UTTCO refused to relocate unless compensated for its expenses. *Id.* As a result, the District Engineer, Colonel John A. Tudela, found that pursuant to condition (f) of Permit

3779 and 33 C.F.R. 325.7(c), the public interest would best be served by suspension of the permit upon written notification to the permittee. *Id.*

On 14 February 1989, the Corps notified UTTCO that Permits 1728 and 3779 were suspended effective that date. Encl. 16. UTTCO was advised of its right to request a public hearing. *Id.* After the hearing, appropriate action would be taken to reinstate, modify or revoke the permits. *Id.* If revoked, the pipelines would have to be completely removed from the waterway at UTTCO's expense. *Id.*

On 24 February 1989, UTTCO acknowledged receipt of the Corps' suspension letter and requested a public hearing. Encl. 17.

On 15 March 1989, UTTCO once again advised the Corps of its position that costs of relocation "outside the banks of the Bayou" of UTTCO's pipeline should be reimbursed by Drainage District No. 6. UTTCO implicitly recognized the Corps' navigational servitude "within the Bayou". Encl. 18. UTTCO noted that it expected the same fair treatment given other companies, specifically alleging that a pipeline of Winnie Pipeline Company, located shallower than theirs, was not required to be relocated. *Id.*

On 30 March 1989, the Corps responded to UTTCO's 15 March 1989, letter stating that it was UTTCO's responsibility to relocate the pipelines as required by the terms and conditions of Permits 1728 and 3779. Encl. 19. UTTCO was informed that Winnie Pipeline Company met Corps clearance criteria of 5 feet, and did thus not require relocation. *Id.* Any pipeline not meeting Corps criteria

would be required to be lowered. *Id.* The Corps advised that the limits of navigable waters considered within Corps' jurisdiction for the pipeline permits are those waters up to the mean high water line. *Id.* The Corps also noted that it has regulatory jurisdiction over wetlands under the Clean Water Act, but always encourages settlement of issues between parties notwithstanding legal positions which may be enforceable in a court of law. *Id.*

On 4 April 1989, UTTCO informed the Corps that in its view major questions still existed concerning the responsibility of Drainage District No. 6 for utility adjustments associated with the widening of the Bayou, UTTCO's compliance with Permits 1728 and 3779 and UTTCO's property rights. Encl. 20. UTTCO stated that it could not authorize the expenditure of nearly $1.6 million to relocate its pipeline until these issues had been resolved. *Id.* UTTCO once again requested a public hearing. *Id.*

The Corps issued a Notice of Public Hearing on Proposed Revocation of Department of the Army Permits 1728 and 3779 on 4 May 1989. Encl. 21.

In response to UTTCO's 4 April 1989 letter, the Corps, by letter dated 11 May 1989, encouraged UTTCO to continue negotiations with the Drainage District regarding any compensation due. Encl. 22. However, the Corps further advised that UTTCO was currently in violation of condition (f) of Permits 1728 and 3779 for failure to lower its pipelines as directed. *Id.*

On 23 May 1989, the Corps issued a Revised Notice of Public hearing on Proposed Revocation of Department of the Army Permits 1728 and 3779. Encl. 23. The hearing

was rescheduled for Wednesday, 28 June 1989, at 7:00 p.m. at 855 Florida Avenue, Beaumont, Jefferson County, Texas. *Id.*

On 2 June 1989, the Corps provided photocopies of numerous documents selected by UTTCO on 1 and 2 June 1989 after UTTCO representatives were given the opportunity to view the project files, pursuant to the Freedom of Information Act (FOIA), subject to deletion of documents properly withheld under FOIA. Encl. 24. Photocopies of approximately 600 pages of documents were turned over to UTTCO.

On 28 June 1989, plan and profile drawings for the UTTCO pipelines were prepared by the Corps showing existing location and depth of each pipeline and the required safety zone below the proposed channel. Encl. 25. These were displayed at the Public Hearing and were based on a survey by Garrod & Dartez, Inc., in December 1988, and a 13 November 1988 survey by UTTCO. *Id.*

On Wednesday, 28 June 1989, a public hearing was held by the Corps at the John Gray Institute Auditorium, 844 Florida Avenue, Beaumont, Texas, before Colonel John A. Tudela, District Engineer, Department of the Army Corps of Engineers, and reported by Patricia A. English, CSR, Charlotte Smith Reporting, Inc., 235 Orleans, Beaumont, Texas. UTTCO and the Drainage District were among those represented at the hearing.

UTTCO made opening and closing statements in opposition to the proposed revocation of its permits. Dennis Dylewski, Esq., spoke on behalf of UTTCO. Encl. 26 at 11. He stated that UTTCO recognized and continues

to recognize the Corps' jurisdiction over navigable waterways, and its navigable servitude to the ordinary high water mark on the banks of the bayous that are involved. *Id.* at 11-12. However, he stated that UTTCO was entitled to compensation for relocating its pipelines "outside the jurisdiction of the Corps" on the fastlands. *Id.* at 12. He contended that under the Flood Control Act of 1965, as well as the local cooperation agreement entered into between the United States and Jefferson County Drainage District No. 6, that the Drainage District was liable to compensate UTTCO for any pipeline relocation in the fastlands. *Id.* at 13-14, 19-20. Mr. Dylewski noted that UTTCO made a review of Corps' files under the Freedom of Information Act, and that on 22 April 1987, the Corps declined to use its permit power to require a utility company to move electric poles on dry lands. *Id.* at 15. He also stated that in such review, there was a November 1982, memo in which ARCO, who had a line in the area, must pay for relocation only under the bayou, not on fastlands. *Id.* at 15-16. Finally, the review found correspondence from the Corps to the City of Port Arthur in connection with some water lines, and the Corps' position was that "under the bayou it has jurisdiction; outside the bayou, you're entitled to compensation." *Id.* at 16. He contended that "outside the bayou", UTTCO was a property owner, that the Corps had no jurisdiction over this property "outside the bayou", and concluded UTTCO was entitled to compensation from the Drainage District for any relocation of pipelines on such property. *Id.* at 55.

Twelve individuals made statements in support of the Federal project and in favor of revoking UTTCO's permits for non-compliance. *Id.*

Twelve exhibits were submitted and attached to the official record of the hearing. *Id.* All of the exhibits indicated public support that the pipeline companies be held to the terms of their permits and required to make necessary adjustments for the Taylors Bayou Drainage Flood Control Project. *Id.* The exhibits included statements for the City of Beaumont; Congressman Jack Brooks; the County Judge of Jefferson County, Texas; a resolution of the Commissioner's Court of Jefferson County, Texas; Mark W. Stiles, State Representative; State Senator Carl A. Parker; and various drainage districts in Jefferson County, Texas. *Id.*

The County Engineer of Jefferson county, Texas, in a letter dated 29 June 1989, urged that the Corps should enforce its permit authority and he argued that continued delays would cause damage to public and private property from flood waters. Encl. 27.

On 5 July 1989, the Corps' Division Counsel released forty-seven (47) documents to UTTCO's attorneys in response to their Freedom of Information Act request dated 8 May 1989. Encl. 28. Forty-one (41) documents were withheld from release, under Exemption 5 of the Freedom of Information Act, 5 U.S.C. Section 552(b)(5), based on the deliberative process privilege and/or the attorney work-product privilege. *Id.*

The position of UTTCO with regard to the suspension of pipeline permits 1728 and 3779 was presented to the Corps by letter dated 7 July 1989, as a follow-up to the public hearing, from Dennis M. Dylewski of Calvin, Dylewski, Gibbs, Maddox, Russell & Verner, Attorneys at Law. Encl. 29.

UTTCO contended that "suspension and revocation of UTTCO's permits" was improper because there was no harm to the public interest by UTTCO's activities, and that such action coerces UTTCO into surrendering private property rights which are protected by the Untied [sic] States and State of Texas Constitutions. *Id.* at 1. UTTCO stated that it "has consistently recognized and continues to recognize the Corps' jurisdiction over Hillebrandt Bayou, which has been deemed a navigable stream for many years." *Id.* at 2. Further, "UTTCO has been willing and remains willing to relocate its pipelines within the Bayou to the extent necessitated by the current Taylors Bayou flood control project and to bear all costs of such relocation." *Id.*

However, according to UTTCO, the problem is that the flood control project involves widening as well as deepening the Bayou, thus affecting areas outside the Bayou allegedly not subject to the Corps' jurisdiction, and pipeline relocation is necessary "within the bayou and outside the bayou". *Id.* A "partial relocation" of the pipelines "within the streambed of Hillebrandt Bayou" would be "a futile exercise that would not advance the progress of the flood control project." *Id.* "Because the flood control plan cannot be accommodated by the very action that UTTCO is obligated and willing to carry out pursuant to its permits, however, UTTCO is foreclosed from performing those acts which might rightfully be demanded by the Corps on pain of revocation of UTTCO's permits." *Id.* "UTTCO cannot be in noncompliance with its permits if the purported acts of compliance would not satisfy the demand on which the Corps bases its permit suspension and revocation actions." *Id.*

Apparently, this is UTTCO's bases for contending that suspension or revocation would not serve the public interest.

UTTCO stated that under Section 3 of the Flood Control Act of 1936, 33 U.S.C. 701c, which is incorporated by the Flood Control Act of 1965 (the authorizing statute for the instant project), the local agency (Jefferson County Drainage District No. 6 in this instance) shall "provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project. . . . " *Id.* at 3. Similar language found in House Document No. 206 was cited by UTTCO. *Id.* The local cooperation agreement between the United States and Jefferson County Drainage District No. 6 (Drainage District) also contains similar language. *Id.* at 4.

UTTCO contended that it is not in violation of its permits because "streambed relocation alone will not satisfy the Corps' demand, . . . fastlands relocation is not affected by the federal navigational servitude, and . . . the Corps is not authorized to compensate UTTCO for required fastlands relocation." *Id.*

UTTCO also argued that revocation of the permits would cause irreparable harm to those who depend on UTTCO for natural gas service, as well as UTTCO employees, suppliers, end users and vendors. *Id.* Thus, revocation of the permits would coerce UTTCO into proceeding with relocation demands and surrendering its constitutional rights to compensation for the taking of its private property rights by the Drainage District, which denies its obligations and lacks the funds to meet such obligations. *Id.* at 4-5.

UTTCO next asserted its right to compensation, based upon a taking of private property (UTTCO's right-of-way), for relocation of its pipelines outside the navigation servitude, pursuant to both the United States and Texas Constitutions. *Id.* at 5. UTTCO stated that the Drainage District is clearly obligated for such compensation as set forth in the local cooperation agreement. *Id.* at 6. In addition, the Texas Constitution was cited as authority for the Drainage District's obligation to pay compensation to UTTCO. *Id.*

Moreover, according to UTTCO, under Texas law, the Drainage District has the obligation to pay such compensation "up front at the time of the relocation", and no taking is permissible if there are not sufficient funds to pay compensation. *Id.* at 7.

UTTCO stated that "(t)he law is simply that the Corps jurisdiction is limited and that, outside those limits, UTTCO is entitled to compensation by the Drainage District". *Id.* at 9. UTTCO contended that the Corps has "recognized this rule of law in letters to various entities", and that the Drainage District has recognized the rule by obtaining right-of-way for surface lands adjoining the bayou and by paying compensation to Gulf State Utilities for removal of a distribution pole on fastlands. *Id.* Finally, UTTCO referred to a 10 October 1986 letter to the Corps in which the Drainage District warranted it would pay costs of relocation which the United States was unable to accomplish pursuant to its navigation powers. *Id.*

Jefferson County Drainage District No. 6, in a 7 July 1989 letter to the Corps included photographs of heavy

rain damage from flooding and a resolution urging the Corps to enforce the permits. Encl. 30.

A 11 July 1989 letter from Exxon, to the Corps urges that UTTCO's pipeline permits across Hillebrandt Bayou be reinstated and that the Drainage district be financially responsible for the "adjustment of pipelines outside the boundaries of the navigational waterway of Hillebrandt Bayou." Encl. 31.

On 13 July 1989, Dennis Dylewski of Calvin, Dylewski, Gibbs, Maddox, Russell & Verner, Attorneys at Law, sent a letter to the Corps regarding UTTCO's FOIA request relative to the Public Hearing. Encl.32 [sic]. UTTCO, as noted above, made a FOIA request to the Corps on 8 May 1989. The Public Hearing in this matter was held on 28 June 1989. Encl. 26. At the hearing, the Corps noted that the record would remain open until 12 July 1989, and that written statements postmarked on or before this date will be included in the hearing record. *Id.* at 58. The Corps responded to UTTCO's FOIA request, as noted above, on 5 July 1989, at which time the Corps' released forty-seven (47) documents and withheld forty-one (41) documents as privileged. The Corps offered to extend the time limit for supplementing the record to allow further times for UTTCO to consider the documents released pursuant to UTTCO's FOIA request. Encl. 32. Dennis Dylewski advised that in his view, a proposal to extend the time limit for supplementing the 28 May 1989 Public Hearing (the Public Hearing was actually held on 28 June 1989, and not 28 May 1989), "in order to remedy the harm done to UTTCO by the Corps' wrongful withholding of documents" under the Freedom of Information Act, is an insufficient response to UTTCO's request

because of the problems created by the failure of the Corps to comply with FOIA. Encl. 32.

United Gas Pipeline Company, by letter to the Corps dated 13 July 1989, indicated its support of UTTCO's position that compensation for the relocation of facilities "outside the boundaries of Hillebrandt Bayou" must be paid. Encl. 33.

A 26 July 1989 Corps letter to Mr. Dennis Dylewski of Calvin, Dylewski, Gibbs, Maddox, Russell & Verner, Attorneys at Law, confirmed that the closing date for supplementing the public hearing had been extended to 24 July 1989. Encl. 34.

By letter dated 6 September 1989, UTTCO notified the Corps' dredging contractor, King Fisher Marine Service, Inc., that it had property rights that neither the Corps or Drainage District had acquired for the widening of Hillebrandt Bayou. Encl. 35.

By Memorandum for Files dated 28 September 1989, the Corps reported on UTTCO's interference with the Corps contractor's work on Hillebrandt Bayou. Encl. 36. It was noted that a meeting took place on 22 September 1989, in which the Contract No. DACW64-89-C-0025 between King Fisher Marine Services, Incorporated and the United States for dredging on the project, was modified to change dredging to a point away from UTTCO's pipeline as a result of legal action threatened against King Fisher by UTTCO. *Id.*

By letter dated 11 October 1989, Uttco notified the Corps' dredging contractor that it may be held responsible for any and all damages UTTCO may sustain as a

result of the dredging contractor's activities in Hillebrandt Bayou. Encl. 37.

By letter dated 23 October 1989, the Corps' dredging contractor notified UTTCO that it was the contractor's intention to perform the work called for in its contract with the Corps. Encl. 38.

II. LEGAL ANALYSIS

Congress authorized the Taylors Bayou Drainage and Flood Control Project, of which Hillebrandt bayou is a part, pursuant to the Flood Control Act of 27 October 1965 (79 Stat. 1073, P.L. 89-298). Section 204 of the Act states, "The following works of improvement [of which the Taylors Bayou Project is one] for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army in the supervision of the Corps of Engineers. . . . "

The Board of Engineers recommended "improvement of the Taylors Bayou, for flood control and major drainage, by enlarging and rectifying the stream channels [including Hillebrandt Bayou] and constructing a diversion channel and salt-water gate, generally in accordance with the plan of the district engineer and with such modifications thereof as in the discretion of the Chief of Engineers may be advisable. . . . " H.R. Doc. NO. 206, 89th Cong., 1st Sess. 5 (1965).

UTTCO has acknowledged that Hillebrandt Bayou is a navigable stream, stating, *e.g.*, as follows:

> UTTCO has consistently recognized and continues to recognize the Corps' jurisdiction over Hillebrandt Bayou, which has been deemed a navigable stream for many years. UTTCO has been willing and remains willing to relocate its pipelines within the Bayou to the extent necessitated by the current Taylors Bayou flood control project and to bear all costs of such relocation. UTTCO has no dispute with the Corps over this issue.

(See Encl. 29).

The two permits of UTTCO which are the subject of the hearing herein were issued pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. Section 403).

Condition (f) of each Permit provides:

> (f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary or the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice form the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and

> restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

This condition authorizes the Secretary of the Army to require relocation or removal of permitted structures which interfere with operations of the Untied [sic] States. In the instant situation UTTCO's pipelines interfere with the Taylors Bayou Project, an operation of the United States. Project specifications with regard to UTTCO's pipelines are shown in Enclosure 25. *Id.* Project specifications mandate that pipelines located within the safety zone, shown for each pipeline at enclosure 25, must be relocated. *Id.* The project specifications set out in enclosure 25 are in accordance with the Corps' regulation (encl. 2a) which requires pipelines to be at least five (5) feet below the bed of the waterway. Both of UTTCO's pipelines fall within this safety zone. Encl. 25. Thus, the Secretary of the Army has the authority to seek removal or alteration of the pipelines in accordance with condition (f).

> Condition (g) of each of the permits provides as follows:
>
> > (g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

This provision also supports the United States' authority to mandate removal or relocation of UTTCO's

pipelines as a result of its operations in the Taylors Bayou Project without being subject to any liability or claims for damages or injury to such pipelines.

A permit issued by the Secretary of the Army is a mere license, revocable whenever necessary in the interests of commerce and navigation, and such revocation does not constitute a taking without compensation. *Miami Beach Jockey Club v. Dern*, 86 F.2d 135, 135 (D.C. Cir. 1936), *cert. denied* 299 U.S. 556.

UTTCO was notified repeatedly that the Taylors Bayou Drainage and Flood Control Project required that their pipelines must be lowered to accommodate enlarged (deepened and widened) channel dimensions of Hillebrandt Bayou. UTTCO refused to begin relocation until it is assured it would be compensated for the alleged costs of the widening outside the Bayou.

A determination was made by John A. Tudela, Colonel, DE, that the public interest would be served by suspension of the permits in accordance with Corps' regulations at 33 C.F.R. Part 325.7. The permits were suspended on 14 February 1989.

A public hearing was requested by UTTCO. This was held on 28 June 1989, following the procedures prescribed in 33 C.F.R. Part 327.

After completion of the hearing, 33 C.F.R. Part 325.7(c) provides that the District Engineer will take action to reinstate, modify, or revoke the permit. In taking this action, consideration is given to the matters discussed at the public hearing. The District Engineer may

re-evaluate the circumstances and conditions of any permit and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest.

In the present case, UTTCO has not complied with the terms and conditions of the permits which require it to remove or alter the structural work as required by future operations by the United States. The permits do not provide that future operations be within the streambed of Hillebrandt Bayou, or that the owner must be given assurance of compensation for such pipeline relocation on fastlands. On the contrary, permit conditions state that the owner will be required to remove or alter the structural work for future operations without expense to the United States. Further, no claim shall be made against the United States on account of any such removal or alteration. The evidence of public interest in the Taylors Bayou Drainage and Flood Control Project is overwhelmingly demonstrated in the transcript of the public hearing and record.

The pipelines have been in place since 1951 and 1957. A considerable benefit has accrued to the permit owner during this period of time with the known and expressed understanding that future operations by the United States could require an alteration in the position of the structure or work authorized without expense to the United States.

The delay due to the refusal to relocate the pipelines is a financial detriment to the Federal project and the public need which far outweighs the expense to UTTCO.

"There is nothing novel or unconstitutional" in requiring the permittee to relocate or remove pipelines

constructed in and across the bed of a navigable water pursuant to a permit from the Corps. *United States v. 597.175 Acres of Land, Etc.*, 241 F.Supp. 796, 799 (W.D.LA 1965). "The permits under which the pipeline crossings were made recognize and require that the relocation be made at defendants' expense, and, in the opinion of this Court, a reasonable interpretation thereof would also require that such incidental work on adjoining lands as is necessary to accomplish this purpose be effected at defendants' expense." *Id.* The instant situation is identical to that in *597.175 Acres*, and requiring UTTCO to remove or relocate its pipelines without expense to the United States is likewise authorized.

In the case of *Acton v. United States*, 401 F.2d 896 (9th Cir. 1968), the Court held that a permit does not create a vested property right compensable under the Fifth Amendment. The Court stated, "It is clear that a license does not constitute property for which the government is liable upon condemnation, and passes to the licensee no estate or interest in the lands." *Id.* at 899. The Court also cited as examples several cases in which it was held that river and harbor structures that had been permitted by the United States were subject to being revoked by the sovereign without the payment of compensation. *Id.* at 899-890 and cases cited. (See also *Miami Beach Jockey Club v. Dern*, 83 F.2d 715 [C.A.D.C. 1936]; and *U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 35 L.Ed. 1063, 53 S.Ct. 81 [1913].)

The pipeline owners' permits are expressly revocable by the Corps. It is not a vested property right; the permit on its face states that it does not convey any property

right. Since the permit never was a property right, there is no requirement to pay just compensation.

UTTCO's contention that it is entitled to compensation for relocation of its pipelines in the 'fastlands' is not relevant to and does not limit the authority of the United States to revoke UTTCO's pipeline permits within the navigational servitude where the pipelines are inconsistent with the Taylors Bayou Project. A waiver of the navigation servitude "will not be implied, but instead must be surrendered in unmistakable terms." *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987). No waiver has been made. In addition, 33 U.S.C. 701c, which applies to the Flood Control Act of 1965, and in which the local sponsor's obligation to provide without costs to the United States all easements and rights-of-way for the project, also states that "nothing herein shall impair or abridge the powers now existing in the Department of the Army with respect to navigable streams." Finally, UTTCO is not a third-party beneficiary of the local cooperation agreement, *Berberich v. United States*, 5 Cl.Ct. 652 (1984), *aff'd* 770 F.2d 179, and cannot claim the local cooperation agreement as the basis for a limitation on the navigational servitude.

UTTCO's contention that it was denied equal protection in that some pipeline owners were treated more favorably than UTTCO is without merit. As set forth at enclosure 19, all pipeline owners not meeting Project specifications were required to relocate their pipelines.

The suspension of the permits was in accord with Section 10 of the River and Harbor Act, 33 U.S.C. Sec. 403. Section 10 prohibits the "creation of any obstruction not

affirmatively authorized by Congress", which includes specific structures as well as "other structures". Section 10 also provides that it is not lawful to alter in any manner the course, location, condition, or capa ity of any navigable water without authorization of the Secretary of the Army. The pipelines fall within the type of obstructions and alterations subject to regulation under Section 10, and must be approved by the Secretary of the Army upon recommendation of the Corps of Engineers.

Modification or revocation of permits in the public interest is authorized pursuant to 33 C.F.R. Sec. 325.7. The relevant factor to be considered regarding the public interest is "whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended." *Id.* at subd. (a).

In my opinion, based on the record in this case, circumstances relating to the pipelines have changed since UTTCO's permits were issued. Namely, UTTCO's pipelines, authorized by such permits, do not meet the specifications of the navigation and flood control project currently being undertaken by the United States in the Hillebrandt Bayou. The completion of such project, authorized by Congress in the Flood Control Act of 1965, is clearly in the public interest, and the relocation or removal of UTTCO's pipelines is necessary to meet project specifications. Modification of the permits as a basis for pipeline relocation, or revocation of the permits as a basis for removal, is necessary in the public interest.

Necessity for Administrative Action

Removal of the pipelines to a safe distance from the channel to be dredged is a prerequisite to completion of the Federal project. The District Engineer is authorized to and must decide whether UTTCO's refusal to relocate or remove its pipelines is a violation of the terms and conditions of the permits which requires action to conform to the Federal project.

III. ACTIONS AVAILABLE TO THE DISTRICT ENGINEER

1. The District Engineer has the following alternatives pursuant to 33 C.F.R. 325.7(c):

a. Reinstate the permits to allow the pipelines to remain in place at their existing locations;

b. Modify the permits to require relocation of the pipelines to conform with the clearance depths for the Federal project; or

c. Revoke the permits thereby requiring complete removal of the pipelines from the waterway.

2. Based upon the foregoing, it is my opinion that the District Engineer has sufficient basis for a determination to revoke or modify the permit under 33 C.F.R. Part 325.7.

13 August 1990
DATE

/s/ Edward V. Herrington
EDWARD V. HERRINGTON
Assistant District Counsel

ACTION

Modification of the permits to require relocation of the pipelines to conform with project specifications does not appear to be a viable alternative. United Texas Transmission Company has repeatedly refused to relocate its pipelines as requested, in violation of the terms and conditions of the permits. UTTCO has consistently taken the position that it will not relocate its pipelines until it receives compensation from Jefferson County Drainage District No. 6 for what it considers to be its private property interests "outside the Bayou." Thus, although modified permits consistent with this Statement of Findings would meet project specifications, mutual agreement on modified permits cannot be reached at this time given the position of UTTCO.

UTTCO's pipelines do not meet project specifications and must be removed or relocated in order to meet such specifications. Since modification of the permits to provide for relocation cannot be achieved, revocation of the permits is necessary as a basis for removal of the pipelines. Removal of the pipelines will enable the United States to continue work on the project in accordance with project specifications.

Therefore, having considered the facts of this case and the law applicable thereto, I find, pursuant to 33 C.F.R. 325.7, that the public interest would best be served by revocation of the permits. If the Company fails to remove its pipelines, legal action will be pursued.

13 August 1990
DATE

/s/ Brink P. Miller
BRINK P. MILLER
Colonel, Corps of Engineers
District Engineer

APPENDIX F

33 USC § 701c. (ch 688, § 3, 49 Stat. 1571,June 22, 1936; ch 877, § 4, 50 Stat. 877,Aug. 28, 1937) **Rights-of-way, easements, etc.; acquisition by local authorities; maintenance and operation; protection of United States from liability for damages; requisites to run-off and waterflow retardation and soil erosion prevention assistance**

That hereafter [after June 22, 1936] no money appropriated under authority of this act shall be expended on the construction of any project until States, political subdivisions thereof, or other responsible local agencies have given assurances satisfactory to the Secretary of War [Secretary of the Army] that they will (a) provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project, except as otherwise provided herein; (b) hold and save the United States free from damages due to the construction works; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of War [Secretary of the Army]: Provided, That the construction of any dam authorized herein may be undertaken without delay when the dam site has been acquired and the assurances prescribed herein have been furnished, without awaiting the acquisition of the easements and rights-of-way required for the reservoir area: And provided further, That whenever expenditures for lands, easements, and rights-of-way by States, political subdivisions thereof, or responsible local agencies for any individual project or useful part thereof shall have exceeded the present estimated construction cost therefor, the local agency concerned may be reimbursed one-half

of its excess expenditures over said estimated construction cost: And provided further, That when benefits of any project or useful part thereof accrue to lands and property outside of the State in which said project or part thereof is located, the Secretary of War [Secretary of the Army] with the consent of the State wherein the same are located may acquire the necessary lands, easements, and rights-of-way for said project or part thereof, after he has received from the States, political subdivisions thereof, or responsible local agencies benefited the present estimated cost of said lands, easements, and rights-of-way, less one-half the amount by which the estimated cost of these lands, easements, and rights-of-way exceeds the estimated construction cost corresponding thereto: And provided further, That the Secretary of War [Secretary of the Army] shall determine the proportion of the present estimated cost of said lands, easements, and rights-of-way that each State, political subdivision thereof, or responsible local agency should contribute in consideration for the benefits to be received by such agencies: And provided further, That whenever not less than 75 per centum of the benefits as estimated by the Secretary of War [Secretary of the Army] of any project or useful part thereof accrue to lands and property outside of the State in which said project or part thereof is located, provision (c) of this section shall not apply thereto; nothing herein shall impair or abridge the powers now existing in the Department of War [Department of the Army] with respect to navigable streams: And provided further, That nothing herein shall be construed to interfere with the completion of any reservoir or flood control work authorized by the Congress and now under way.

(d) As a condition to the extending of any benefits, in prosecuting measures for run-off and water-flow retardation and soil erosion prevention authorized by Act of Congress pursuant to the policy declared in this Act, to any lands not owned or controlled by the United States or any of its agencies, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of such Acts, require –

(1) The enactment and reasonable safeguards for the enforcement of State and local laws imposing suitable permanent restrictions on the use of such lands and otherwise providing for run-off and water flow retardation and soil-erosion prevention:

(2) Agreements or covenants as to the permanent use of such lands; and

(3) Contributions in money, services, materials, or otherwise to any operations conferring such benefits.

APPENDIX G

TAYLORS BAYOU, TEXAS

REPORT OF THE ACTING CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY

HEADQUARTERS
DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON 25, D.C.

In Reply Refer to
ENGCW-PD

11 July 1962

SUBJECT: Taylors Bayou, Texas

TO: THE SECRETARY OF THE ARMY

1. I submit for transmission to Congress my report on a survey of Taylors Bayou, Texas, in the interest of flood control, drainage, and navigation, authorized by the Flood Control Act approved 24 July 1946. My report includes the reports of the District and Division Engineers and the Board of Engineers for Rivers and Harbors.

2. The Taylors Bayou watershed contains an area of about 586 square miles in southeast Texas. The North and South Forks rise about 30 miles west of Port Arthur, then flow southeasterly and join about 15 miles west of the city to form Taylors Bayou. Thence, the stream flows easterly about 19 miles to its mouth at the Sabine-Neches Waterway. Hillebrandt Bayou, the principal tributary of Taylors Bayou, rises about 6 miles northwest of Beaumont, flows southerly and joins the main stream about 8 miles west of Port Arthur. Tidewater extends about 7.5 miles above the mouths of the North and South forks and

to mile 15.8 on Hillebrandt Bayou. The watershed is highly developed, both industrially and agriculturally. The cities of Beaumont and Port Arthur have oil refineries and related industries and a rapidly expanding chemical industry. Rice is cultivated extensively in the western portion of the basin, and approximately one-half of the watershed is served by irrigation canals. Cattle-raising is the major livestock industry. The population of the basin, including the cities of Beaumont, Port Arthur, and Port Neches, which are partially in the watershed, was 245,700 in 1960. There are no existing Federal projects for improvement of Taylors Bayou, but beginning 1912, extensive flood control and drainage improvements were made by local interests, consisting principally of enlargement and rectification of stream channels and the construction of drainage laterals. More than 300 miles of stream channels have been so improved, extending to all parts of the watershed except the southern marsh area. A navigation lock and salt-water gate in the lower end of Taylors Bayou at mile 0.95 were constructed by the Beaumont Navigation District in 1915 to prevent intrusion of salt water to irrigation pumps on the bayou. The gate was rebuilt in 1935 and enlarged in 1949 to provide increased discharge capacity. It is estimated that the local drainage districts spent about $2,000,000 on drainage improvements prior to 1946; since that date, local interests report expenditures of $7,483,000, of which $1,954,000 has been for work on the main stream channels which they desire to be further improved by the United States. The watershed is served by improved highways, railroads, airlines, and an extensive system of electrical transmission lines

and petroleum pipelines. Water transportation is afforded by the Sabine-Neches and Gulf Intracoastal Waterways.

3. Taylors Bayou watershed is subject to numerous periods of intense precipitation. Severe floods occurred in May and November 1946. Others were recorded in 1941, 1942, 1945 and 1949. Flood plain areas in the basin total 79,600 acres, about 20 percent of the watershed. Local interests request that the United States undertake enlargement and straightening of Taylors Bayou and its principal tributaries, and provide an auxiliary outlet for Taylors Bayou, which improvements they believe would insure elimination of flood damages and afford land enhancement benefits. Navigation interests feel that the desired improvements would result in Taylors Bayou becoming a valuable feeder tributary to the Gulf Intracoastal Waterway and that the United States should construct, operate, and maintain any required navigation facilities. Local interests propose to reconstruct and maintain the drainage improvements above the main channels.

4. The District Engineer finds that the major water problem in the Taylors Bayou watershed is the provision of adequate outlet channels for farm drainage and for flood waters from the upper reaches of Hillebrandt Bayou in the city of Beaumont. The improvements made by local interests since 1946 have included some enlargement of the outlet channels, but no sufficient to provide a balanced drainage system. The lack of such outlets has limited the effectiveness of the drainage channels and inadequate maintenance has further aggravated the drainage situation. Under these conditions, damages occur to urban properties and to farm properties and improvements in the form of increased maintenance

costs, low order of land use for agriculture and other purposes, and decreased net returns from crop and pasture lands. On Hillebrandt Bayou, the problem is to provide sufficient capacity for the conveyance of flood runoff from the improved channel above State Highway 124 to the Sabine-Neches Waterway without increasing flood damages in the lower reaches. Irrigation water supply, which is protected from salt-water intrusion by the existing gates and lock on the lower end of Taylors Bayou, must be preserved. Navigation of the bayou is not extensive and prospective commerce is insufficient to justify provision of a new and larger lock. The plan proposed by the District Engineer for the improvement of drainage conditions contemplates a complete system for the watershed to provide suitable drainage for agricultural lands and with sufficient excess channel capacity to carry the increased flood runoff from the improved upper reach of Hillebrandt Bayou. The on-farm ditches and upstream improvements would be provided by local interests, while the Federal project, consisting of the major outlets, would be provided jointly by local interests and the Federal Government. The District Engineer in his report dated 20 January 1954, estimated the cost of the over-all plan at $14,749,000, of which $6,737,000 would be the cost of the major outlets.

5. The District Engineer finds that each portion of the proposed project is complementary to the rest and is necessary for a full realization of the benefits; therefore, it is not feasible to estimate separately the benefits that might accrue to the several portions of the project. Since 1946 local interests have spent $1,954,000 on improvement of the major outlets within the limits established for

the Federal project. The remaining work consists of enlargement and rectification of several miles of natural and artificial channels, with provision of a gate to prevent intrusion of salt water into Taylors Bayou. The District Engineer has made an equitable allocation of costs between Federal and non-Federal interests, giving due consideration to the value of work already accomplished by such interests with the limits of the Federal improvement. He recommends improvement of Taylors Bayou by enlarging and rectifying the stream channels and constructing a diversion channel and salt-water gate, generally as described under the plan of improvement for the Federal project, subject to certain requirements of local cooperation. The Division Engineer concurs.

6. The Board of Engineers for Rivers and Harbors concurs in general with the reporting officers and recommends the improvement, subject to local cooperation.

7. The plan recommended by the District and Division Engineers and the Board of Engineers for Rivers and Harbors is compatible with the present needs of the area for flood control and drainage with only minor modification.

8. Under conditions and price levels prevailing in July 1961, the total cost of the recommended plan of improvement is estimated to be nearly $18,800,000 of which $9,870,000 is the cost of the major outlet. Local interests have spent $1,954,000 on improvements of the major outlets within the limits established for the Federal project, leaving $7,016,000 as the estimated cost of work remaining to be done, including $1,205.,000 for rights-of-way, bridge alterations and relocations to be provided by

local interests. The total annual charges are estimate at $1,299,000 of which $236,000 would be Federal and $1,063,000 non-Federal, the latter including $550,200 for maintenance and operation. The average annual benefits are estimated at $8,926,000, of which $1,492,000 is due to flood damage reduction and $2,434,000 to increased land use. The benefit cost ratio is 3.0 to 1.

9. After due consideration of the reports of the District and Division Engineers, the Board of Engineers for Rivers and Harbors, and the information concerning current conditions submitted by the reporting officers, I recommend improvement of Taylors Bayou, Texas for flood control and drainage, by enlarging and rectifying the stream channels and constructing a diversion channel and salt-water gate generally in accordance with the plan of the District Engineer and with such modifications thereof as in the discretion of the Chief of Engineers may be advisable; at an estimated cost to the United States of $6,290,000 for construction, provided that prior to construction local interests give assurances satisfactory to the Secretary of the Army that they will: (a) provide without cost to the United States all lands, easements and rights-of-way necessary for the construction of the project when and as required; (b) make all necessary alterations and relocations of structures and utilities; (c) contribute in cash 6.3 percent of the construction cost of the work to be done on the Federal project, presently estimated at $421,000 and construct such additional equivalent items of work as may be agreed upon by the Federal Government and local interests, subject to final adjustment of the amount after actual costs and values have been determined; (d) hold and save the United States free from

damages due to the construction works; (e) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army; (f) prevent encroachment in the flood carrying capacity of the improved channels and the diversion channel; and (g) construct and maintain the local drainage works required to fully and effectively utilize the improved outlet system.

WILLIAM F. CASSIDY
Major General, USA
Acting Chief of Engineers

APPENDIX H
LETTER OF TRANSMITTAL

DEPARTMENT OF THE ARMY

Washington 25, D.C.

June 11, 1965

Honorable John W. McCormack

Speaker of the House of Representatives

Dear Mr. Speaker:

I am transmitting herewith a favorable report dated ll July 1962, from the Acting Chief of Engineers, Department of the Army, together with accompanying papers and an illustration, on a survey of Taylors Bayou, Texas, authorized by the Flood Control Act approved 24 July 1946.

The views of the Governor of Texas, the Departments of the Interior and Agriculture, and the Federal Power Commission are set forth in the enclosed communications, together with a letter of the Chief of Engineers furnishing additional information to the Governor of Texas.

The Bureau of the Budget does not believe that sufficient reason exists for crediting local interests for work accomplished by such interests prior to project authorization: and accordingly, the Bureau of the Budget recommends that the conditions of local cooperation be applied only to the new work recommended for construction. On that basis and on conditions and price levels prevailing in July 1961, the Bureau notes the estimated cost of the project would be $7,916,000 of which $3,008,000 would be

allocated to flood control and $4,908,000 would be allocated to major drainage purposes. Given these conditions and current policies, local interests would then be expected to contribute the cost of lands and relocations ($458,000) for the flood control portion of the project and 50% ($2,454,000) of the total cost allocated to drainage purposes. This would result in the local interests bearing 36.8% or $2,912,000 of the total estimated first cost of the project.

The Bureau of the Budget also notes that the information on which the report is based is in large part over 10 years old and that no specific jurisdiction is presented for the substantial increase in benefits which is incorporated in the updating of the report by the Chief of Engineers. Accordingly, if the project is authorized, the Bureau of the Budget would expect a re-evaluation of the project prior to any request for funds to initiate the construction.

I concur in the view that a re-evaluation of the project based on current data should be made prior to any request for funds to initiate construction. Further, I recommend that local interests contribute 25.4 percent toward the cost of construction in lieu of 6.3 percent, as recommended by the Chief of Engineers. On this basis the estimated net cost to the United States would be $5,004,000 for construction and the estimated non-Federal costs would be $2,912,000 including $1,205,000 for lands, easements rights-of-way, and relocations, and a cash contribution of $1,707,000.

The Bureau of the Budget advises that subject to consideration of its views, there would be no objection to the submission of the report to the Congress. It states that

no commitment, however, can be made for construction of the project modification, if authorized by the Congress, since this would be governed by the President's budgetary objectives as determined by the then prevailing fiscal situation. A copy of the letter from the Bureau of the Budget is enclosed.

Sincerely,

STEPHEN ALLES
Secretary of the Army

1 Incl.
Report

APPENDIX I

Condition (F) of UTTCO's pipeline permits states as follows:

> (F) That if future operations by the United States require an alteration in the position of the structure or work herein authorized. or if, in the opinion of the Secretary of the Army, it shall become an unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation free, easy and unobstructed; and if, upon the expiration of excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure of fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States in account of any such removal or alteration.

Supreme Court, U.S.
FILED
MAY 3 1994
OFFICE OF THE CLERK

No. 93-1576

In The

Supreme Court of the United States

October Term, 1993

UNITED TEXAS TRANSMISSION COMPANY
(now known as MidCon Texas Pipeline Corp.),

Petitioner.

v.

UNITED STATES ARMY CORPS OF ENGINEERS
and JEFFERSON COUNTY (TEXAS)
DRAINAGE DISTRICT NO. 6,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT JEFFERSON COUNTY (TEXAS) DRAINAGE DISTRICT NO. 6 IN OPPOSITION

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QUESTION PRESENTED

The U.S. Army Corps of Engineers (Corps) issued permits[1] to lay pipelines across a navigable stream to the predecessor of United Texas Transmission Company (UTTCO) which stated that no property interest was vested in the permittee, and required the permittee to "alter or remove" the pipelines if required "future operations" of the United States. The Corps subsequently instituted the Taylors Bayou project, a "future operation" requiring relocation of UTTCO's pipelines, and notified UTTCO to relocate the pipelines. UTTCO refused, insisting it would not relocate the lines until it was guaranteed full compensation for the cost of relocation from the local sponsor, Jefferson County Drainage District No. 6 (District). The Corps revoked the permits. UTTCO filed suit in the district court against the Corps and the District, the Corps counterclaimed, and the district court ordered the pipelines removed. UTTCO complied, and appealed. The court of appeals affirmed.

UTTCO poses four questions. However, this litigation presents only one question:

> Whether the Corps acted in an arbitrary and capricious fashion, abused its discretion, or otherwise acted not in accordance with law in revoking the UTTCO permits in accordance with ¶ (f) of the permits.

---

[1] The permits were issued pursuant to Sec. 10 of the rivers and Harbors Act of 1899, 33 U.S.C. § 403, and are referred to as "Sec. 10" permits.

STATEMENT PURSUANT TO SUP. CT. R. 29.1

This Brief in Opposition is filed on behalf of Jefferson County (Texas) Drainage District No. 6, the local sponsor of the Taylors Bayou Project.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT JEFFERSON COUNTY (TEXAS) DRAINAGE DISTRICT NO. 6 IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The District respectfully submits that UTTCO's Petition for Issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied for the reasons set out below.

OPINIONS BELOW

The opinions below are correctly referenced in the Petition for Writ of Certiorari and are set out in Appendices "C" and "D" to the petition.

JURISDICTION

This Court does not have jurisdiction because the issues presented in the petition are moot. In the trial court, the only relief sought by UTTCO was (1) a declaration by the court that UTTCO was not required to relocate its pipelines without a guarantee that it would be compensated by the District for the cost of relocation; (2) an injunction restraining the Corps from requiring that the pipelines be relocated; and (3) damages for the cost of relocation. The pipelines have been removed pursuant to order of the district court. Therefore, declaratory relief and injunctive relief are moot. The remedy of damages is also moot. Unconstitutional appropriation of a private property right without compensation is the only possible basis for a claim for damages, but, before filing the petition, UTTCO never asserted a claim based on a constitutional taking. Even if its pleadings could be construed as asserting a taking claim, the claim was instituted in the wrong court. Under the Tucker Act, the court of claims has exclusive jurisdiction of such claims.

STATUTES OR OTHER PROVISIONS INVOLVED

Rivers and Harbors Act of 1899, Sec. 10, 33 U.S.C. § 403; Sec. 11, 33 U.S.C. § 406;
Flood Control Act of 1965, Pub. L. 89-298, 79 STAT. 1073 (Oct. 27, 1965); and
Tucker Act, 24 STAT. 505; 28 U.S.C. § 1491.

STATEMENT OF THE CASE

The Taylors Bayou watershed is in the extreme southeast corner of Texas adjoining the basins of the Neches River and Sabine Lake on the east, Pine Island Bayou on the north, Galveston Bay on the west, and the coastal marshes along the Gulf of Mexico on the south. It is thirty-five miles long, twenty-seven miles wide, and has an area of five hundred eighty-six square miles, of which five hundred fifty-nine are in Jefferson County, Texas. It provides drainage that flows south and east toward the north of Taylors Bayou, into the Intracoastal Canal, and then into the Sabine-Neches Waterway and on into the Gulf of Mexico. Hillebrandt Bayou, the principal tributary of Taylors Bayou, drains an area of approximately one hundred fifty-three square miles.

The struggle to control the recurring and destructive floods in the watershed commenced as early as 1912. Virtually all the tributaries have been widened, deepened, and straightened. Three hundred miles of channels have been improved by enlarging and rectifying natural stream channels in the watershed and by an outfall canal from Taylors Bayou to the Intracoastal Waterway. These efforts were not adequate to control flooding. Damages resulting from just one flood, in 1979, approximated forty million dollars.

After the 1979 flood, Congress appropriated funds for the Taylors Bayou Flood Control Project pursuant to the Flood Control Act of 1965, 79 STAT. 1073, P.L. 89-289. Section 204 of the act stated that the authorized works of improvement, including the Taylors Bayou project, were "**for the benefit of navigation and the control of destructive flood waters and other purposes**". (Emphasis added) According to estimates by the Corps, the project will improve drainage, flood control, and navigation capability. The Jefferson County Navigation District, a co-sponsor of the project, has the responsibility of superintending the widening and deepening of the navigation locks on the southern reaches of Taylors Bayou to allow bigger and more economical tugs and barges to use the navigational facilities of the deepened and widened Taylors Bayou and Hillebrandt Bayou.

Construction on the project did not commence until August, 1982. When work began, the Corps notified UTTCO and requested information regarding the precise location and depth of UTTCO's pipelines. From this information it was determined that each of UTTCO's two pipelines interfered with the project. In February, 1987, UTTCO was notified that if it desired to maintain its pipelines across the bayou, the pipelines had to be lowered to comply with project specifications. The Corps also advised UTTCO that the relocation of the pipelines would have to be accomplished at no cost to the government in accordance with the Corps permits issued in 1957. In particular, UTTCO's attention was directed to ¶ (f) contained in each permit, which provides

> [t]hat if future operations by the United States require an alteration in the position of the structure or work herein authorized . . . the owner will be required upon due notice from the Secretary of the

> Army, to remove or alter the structural work or obstructions caused thereby without expense to the Untied States . . .

UTTCO responded that it would proceed with the relocation as soon as it received assurance from the District that UTTCO would be reimbursed for the entire cost of relocation – approximately one million sixty thousand ($1,060,000.00) dollars. After some negotiation, the Corps, and the District, took the position that under the language of the permits the Corps could require UTTCO to relocate the pipelines at UTTCO's expense.

UTTCO remained fast in its position. The flood control project was delayed by UTTCO's unwavering refusal to relocate its pipelines until it received assurance of reimbursement. Pet. App. 20.[2] For five years, UTTCO refused to do anything at all, insisting that it did not have to relocate its pipelines until it had received assurance that the District would reimburse all its relocation expenses. A public hearing was held in June, 1989, at which UTTCO reiterated its refusal to bear the relocation costs and argued that the Corps had no authority to order such relocation. Following the public hearing, but before its permits were suspended, UTTCO filed this lawsuit seeking monetary, injunctive, and declaratory relief based on the contention that it could not be forced to pay for relocation costs.

Over a year later, in August 1990, the Corps revoked the permits. In August 1991, the district court granted summary judgment against UTTCO, holding that UTTCO's improper

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[2] References in this Brief to petitioner's appendix are referred to as Pet. App.; and references in this Brief to respondent's appendix are referred to as Resp. App.

refusal to obey the Corps' order to relocate the pipelines authorized the Corps to revoke the permits and order the pipelines removed under the language in ¶ (f) of the permits. The court of appeals affirmed, and, in the course of its opinion, noted that any wounds suffered by UTTCO were self inflicted while playing "hardball" and engaging in the strong-arm tactic of refusing to relocate its pipelines, in the face of the clear authority of the Corps to order the relocation, and demanding that the District assure it of reimbursement for the entire relocation costs without any legal right to do so. Pet. App. 39.[3]

REASONS FOR DENYING THE WRIT

1. The Corps acted properly in revoking UTTCO's permits.

The court of appeals correctly stated that "[t]he scope of the Corps' authority under § (f) [of the Sec. 10 permits] to demand relocation of the pipelines at the expense of the permit holder is at the heart of this lawsuit," Pet. App. 19, and aptly noted that the Court was concerned with "the Corps' authority under § 10 permits and not why it may have chosen to exercise that authority." *Id.*, n.4.

UTTCO's position throughout the litigation has been that the Corps had no authority to order any relocation without a guarantee of payment of the relocation expense.

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[3] For a more complete statement, reference is made to the statement of facts and procedural history of the case set out in the opinion of the court of appeals, which is adopted by the District.

The court of appeals rejected this contention, as did the district court, holding that the permit language "clearly gives the Corps the authority to order the relocation of the pipelines inside the boundaries of the original permit area at the expense of the pipeline owners," with the limitation that "[t]he clear language of the permits limits . . . " the Corps' authority to impose costs to those costs properly allocable to relocation work between the banks of the bayou as they existed at the time the permits were granted. In the petition, UTTCO skirts the premise on which the lower courts' holdings were based even though, in the trial court, UTTCO admitted that it was responsible for costs of relocation of its pipelines within the original banks.[4] Now, however, UTTCO steadfastly asserts that it is not, and never has been, responsible for payment of any portion of the relocation costs, all of which, it insists, must be borne by the District.

The court of appeals correctly held that UTTCO's "unflagging" refusal to relocate the lines was adequate ground to support the administrative action of the Corps in revoking the permits. UTTCO's sole right to place its pipelines in the navigable stream were conferred by the permits. Resp. App. 1-11. As the court of appeals said, the phrase "work herein authorized" in ¶ 7 of the permits conferred on the Corps the power to impose on utility companies the cost of "alterations to portions of the pipelines within the bayou's channel as it existed when the § 10

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[4] The court of appeals noted in its opinion that "[i]nterestingly, the Corps' findings often quote correspondence from UTTCO in which it asserted a willingness to pay for alterations that it recognized needed to be made inside the original permit area". Pet. App. 38, n. 33.

permits were granted" as required by "future operations of the United States." Pet. App. 26.

Unquestionably, the Taylors Bayou project was such an operation. In light of UTTCO's contumacious refusal to relocate the pipelines, it was not necessary for the court of appeals to consider the intent of Congress in passing the Flood Control Act of 1965, 79 STAT. 1073, because the revocation of the permits resulted in the loss of the only right of the permittee, UTTCO, to maintain obstructions in the navigable stream. As the court of appeals observed,

> [i]f UTTCO had only complied with the Corps' order (even under formal protest), relocated the pipelines, and sued for compensation for the portions of its private easements that were taken and for the costs associated with the relocation in the fastlands, then, under the reasoning set out above, UTTCO clearly would have been entitled to recover. UTTCO did not, however, follow this course. Instead, UTTCO delayed the project by demanding assurances of full compensation – to which it was not entitled – before it would begin work on the relocation. As it turns out, UTTCO's recalcitrance constitutes a valid cause for the Corps to revoke the § 10 permits. As UTTCO never challenged the Corps' authority to order the relocation, but nevertheless refused absolutely to relocate the pipelines, we cannot say that the Corps abused its discretion by revoking UTTCO's permits.
>
> . . . .
>
> As a consequence of those permit revocations, UTTCO lost the option to relocate its pipelines, leaving itself no alternative but to remove those

> portions, both within and without the original permit areas, that need to be moved so that construction of the project could proceed.

Pet. App. 40-41. The alteration and removal language contained in the permits was conditioned only on the requirements of the government, i.e., the Corps. Assuming, as argued by UTTCO, in enacting the Flood Control Act Congress intended local sponsors to bear relocation costs, this does not alter UTTCO's unquestioned contractual duty to the United States to alter or remove its pipelines as required by the Corps' operations.

2. The questions presented in the petition do not raise the controlling issue on which the district court and the court of appeals correctly decided the case.

In the petition, UTTCO poses four questions, each of which is based on an insupportable assumption and none of which was directly raised in the trial court or the court of appeals. Question 1 assumes that Congress conditioned approval of an appropriation of funds for a flood control project upon a requirement that the project's local sponsor acquire all lands and easements and make all necessary utility relocations. Question 2 assumes that the local sponsor, i.e. the District, failed to acquire the necessary property and make the necessary utility relocations it had undertaken to acquire or perform. Question 3 assumes that the court of appeals held that the Corps' permit powers conferred authority upon the Corps in fastlands outside the "permitted area" and the area subject to the federal navigational servitude. Question 4 assumes that the court of appeals held that the Corps could rely upon permit conditions to demand relocations of sections of pipelines not within the permitted

area to facilitate construction of a flood control project having no navigational purpose.

The baseless assumptions in questions 1 and 2 are transformed in UTTCO's petition, p. 6, into a "congressional mandate" "that the projects local sponsor acquire all lands, easements, and rights of way, and *make all utility relocations* necessary for the completion of the project." (Emphasis supplied.) To sustain the assumption in question 1, UTTCO relied on 33 U.S.C. § 701(c), which provides that no appropriated funds shall be expended on the construction of a project until a responsible local agency has given assurance that it will provide " . . . all lands, easements, and rights-of-way necessary for the construction of the project . . . " Neither § 701(c), nor any other statute or act relied on by UTTCO, mentions relocation or alteration of utilities either in the navigable stream or elsewhere. The only act speaking to alteration or removal of pipelines or other obstructions in a navigable stream is 33 U.S.C. §§ 403 and 406, which is the Corps' long-standing authority for issuance and revocation of permits, such as the § 10 permits issued to UTTCO.

It is undisputed that the District complied with § 701(c) by entering into a local cooperation agreement with the United States. UTTCO argues that the District did not have the funds to pay for relocation of UTTCO's pipelines and conjures a "conspiracy" theory involving the District, the Corps and a Congressman, but offers no factual or legal explanation how the accomplishment of a lawful result, authorized by statute, gives rise to any

right of action in its favor. In fact, UTTCO can find no support of any kind for its position.[5]

The provisions of 33 U.S.C. § 701(c) are not germane to the argument made by UTTCO. Likewise, the provisions of 33 U.S.C. §§ 593 and 594 relating to institution of condemnation proceedings have no application because they concern only interests in land (i.e., land or easements), and UTTCO owned neither land nor easement in the bed of Hillebrandt Bayou. It possessed only revocable permits or licenses to lay its lines across the bayou. Since the permits, by their express terms, convey no real or personal property interest to UTTCO, and since no property right was conveyed by the Corps or vested in UTTCO pursuant to the permits, no property rights could be taken from UTTCO by revocation of the permits and no interest existed that was subject to condemnation.[6]

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[5] Only a statute stating that UTTCO did not have to relocate its lines until it was *guaranteed* that payment for the relocation would be made by the local sponsor would support UTTCO's position.

[6] Contrary to UTTCO's argument, there is no "statutory scheme" for the exercise of the power of eminent domain to compel performance of the requirements of ¶ (f) in the permits. The statutes cited by UTTCO refer to "lands and easements", but what the Corps demanded was the relocation of UTTCO's pipelines to accommodate the federal project. The exercise of eminent domain to acquire fee title, including title to the pipelines and easements on the "fastland", would not have resulted in the "alteration or removal" of the lines that interfered with completion of the project, which the Corps sought. If UTTCO was correct that the Corps could not exercise its power under the § 10 permit, UTTCO could not be compelled to "alter or remove" its lines even *after* the exercise of eminent domain to acquire UTTCO's easements. UTTCO's argument demonstrates why ¶ (f) is contained in § 10 permits.

As the federal partner charged with actual construction of the project, only the Corps took action to compel UTTCO's relocation of the pipelines. Indeed, UTTCO ultimately removed the pipelines, not at the instance of the Corps, but in response to an order of the district court.[7] The District agreed with the Corps to provide, and did provide, lands and easements and certain utility locations outside navigable streams at no cost to the Corps, but UTTCO has not cited, and cannot cite, any act by the District designed to compel the relocation of the UTTCO pipelines. The Corps had statutory authority to invoke the conditions of the pipeline permits. By accepting the permits, UTTCO was contractually bound to relocate the lines as directed by the Corps.

Thus, the assumption made by UTTCO in question 1 is factually and legally incorrect. The Corps had the right to cancel the permits without invoking eminent domain authority. Likewise, question 2 incorrectly assumes that the District failed to acquire the necessary property and make the necessary utility relocations "it [had] undertaken to acquire and/or perform". The assumption in question 3 that the court of appeals extended the Corps'

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[7] Pertinent to this point is the observation in the opinion of the court of appeals that

> [t]he Corps noted that UTTCO had been notified repeatedly of the need to relocate the pipelines, but that UTTCO had consistently refused to comply. The Corps also asserted that it had authority to revoke the permits of a recalcitrant permit holder, such at UTTCO, citing a string of precedents which held that a permit holder does not have a vested interest in the permit.

permit authority to fastlands outside the original permitted area is also in error. The court of appeals held that the cost of substantial relocation of the pipelines in the fastlands was compensable but no compensation was due pipeline owners for costs that were merely incidental to relocation within the permitted area.[8] In either case, the pipeline owners are required to alter or remove their pipelines to accommodate a federal project. Likewise, the suggestion in the statement of question 4 that the Taylors Bayou project had no navigational purpose is belied by the expression of the purpose of the Flood Control Act of 1965, and by the fact that deepening and widening of the bayou had obvious benefits to navigation.

3. The decision of the court of appeals is not in conflict with the decision of another United States Court of Appeals.

The court of appeals' opinion is not in conflict with the Eleventh Circuit's opinion in *United States v. Harrell*, 926 F.2d 1036 (1th Cir. 1991), as suggested by UTTCO. *Harrell* was not a permit case, and merely stands for the proposition that whether a stream is "navigable in fact" is a judicial question. UTCO has never contended that Hillebrandt Bayou is not a navigable stream.

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[8] In support of this holding, the court of appeals relied on the prior decision in *United States v. 596.75 Acres in St. Martin Parish, La.*, 241 F.Supp. 796 (W.D. La. 1965).

4. The decision of the Fifth Circuit Court of Appeals is not in conflict with any of its own decisions.

The court of appeals' opinion is not in conflict with its opinion in *Tenneco v. Greater LaFourche Port Commission*, 427 F.2d 1061 (5th Cir. 1970). The court below clearly distinguished *Tenneco* from the present case. In *Tenneco*, neither the Corps nor the United States was a party, the case did not involve a federal project, and the Corps was not involved in the project. *Tenneco* merely held that a local sponsor could not invoke the § 10 permit in a non-federal project. In this case, the District made no claim that the permits inured to its benefit.

5. The decision of the Fifth Circuit Court of Appeals is not in conflict with any decision of this Court and involves no important question of federal law.

The court of appeals' decision is not in conflict with this court's opinion in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979), or with this court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and involves no important question of federal law.

In *Nollan v. California Coastal Commission*, 483 U.S 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987), the Nollans had a property interest, i.e., a lease coupled with an option to purchase the fee, which option they subsequently exercised. The granting of the permit which the Nollans sought was conditioned on their conveyance to the government of a valuable property right (the right to exclude others from their property) for public use.

UTTCO had no such property interest. The permits issued by the Corps and accepted by UTTCO plainly state that

> [i]t is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. **It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation.** (Emphasis in text.)

By acceptance of the permit, UTTCO acknowledged it had no property right which could be affected by the exercise of condition (f).

Even if UTTCO had owned a valuable property interest, a condition imposed on the use of private property meets the constitutional standard of *Nollan* if the condition serves the same purpose as a refusal to issue the permit in the first place, provided such refusal would not constitute a taking. As stated in this Court's opinion in *Nollan:*

> The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. (483 U.S. 836)

If the Taylors Bayou Flood Control Project had been designed and appropriated when issuance of UTTCO's

permits was requested, a legitimate police-power purpose would have been served had the Corps refused to issue the permits for placement of the pipelines in the navigable stream without an agreement from UTTCO to place them so as not to interfere with the dredging required to widen and deepen the channel of the stream in conformity with the plans for the project. Precisely the same purpose was served by the inclusion of ¶ (f) of the permit which required the permittee to "alter or remove" its pipeline to accommodate a future operation of the United States in aid of navigation.

UTTCO complains that the Taylors Bayou Flood Control Project had no navigational purpose, and because the project served no navigational purpose, the "invocation" of the condition contained in the permit served no police-power purpose. Without considering whether this extension of *Nollan* is appropriate, it is sufficient to state that its underlying premise (i.e., the project was not in aid of navigation) is totally incorrect.

The Flood Control Act of 1965, Pub. L. 89-298; 79 STAT. 1073, § 204, plainly states that

> the following works of improvement *for the benefit of navigation and the control of destructive flood waters and other purposes* are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein. (Emphasis supplied.)

As this Court stated in *United States v. Twin City Power Co.*, 350 U.S. 222, 224, 76 S. Ct. 259, 261, 100 L. Ed. 240,

259 (1956), in reversing a court of appeals determination that flood control and water-power development, not improvement of navigation, was the purpose of the project in question:

> It is not for courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation. (Citations omitted.) The role of the judiciary in reviewing the legislative judgment is a narrow one in any case. (Citations omitted.) The decision of Congress that this project will serve the interest of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate. Courts should respect that decision until and unless it is shown "to involve an impossibility," as Mr. Justice Holmes expressed it in *Old Dominion Land Co. v. United States.* (Citation omitted.) *If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced.* (Citations omitted.) As we said in the *Appalachia Power Co., "Flood protection, watershed development,* recovery of the costs of improvements through utilization of power are likewise parts of commerce's control." 311 U.S., at page 426, 61 S.Ct. at page 308.
>
> The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called "a dominant servitude" (citations omitted) or "a superior navigation easement." (Emphasis added.)

UTTCO also asserts that " . . . the use of powers under § 10 of the Rivers and Harbors Act (33 U.S.C. § 403) against compensable property interests in lieu of condemnation proceedings is flatly contradictory to this Court's opinion in *Kaiser Aetna* . . . " While the police power may not be substituted for the payment of compensation for a taking, *Kaiser* does not support UTTCO's contention in this case.

UTTCO derived no property interest from the permits issued by the Corps. The court of appeals recognized that, if it had relocated its pipelines, UTTCO had a property interest in easements and a right to compensation outside the permitted area. However, UTTCO lost the option to relocate the pipelines as a result of the permit revocations. Therefore, it lost any right to compensation, *unless* the Corps abused its discretion, acted arbitrarily, capriciously, or otherwise acted not in accordance with law. Whether the agency abused its discretion in revocation of the permits has been correctly determined and, in any event, presents no important question of federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THAD HEARTFIELD
JACK N. PRICE
GUY GOODSON

Attorneys for Respondent

DEPARTMENT OF THE ARMY

NOTE. – It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See *Cummings v. Chicago*, 188 U. S., 410.)

W-N-243-41-PERMIT-1728

PERMIT

Office of the District Engineer
Galveston District, Corps of Engineers.
Galveston, Texas

13 November, 1951.

United Gas Pipe Line Company
Shreveport 92, Louisiana

Gentlemen:

Referring to written request dated 16 October 1951 I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army to place a 20-inch pipe line across Hillebrandt Bayou at a location approximately 1,000 feet upstream from the Fannette-Port

Acres Road bridge and 9 miles west from Port Arthur, Texas, in accordance with the plans shown on the drawing attached hereto in one sheet, entitled, "PROPOSED 20" PIPE LINE ACROSS HILLEBRANDT BAYOU, JEFFERSON COUNTY, TEXAS," subject to the following conditions:

(*a*) That the work shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment the interests of navigation so require.

(*b*) That any material dredged in the prosecution of the work herein authorized shall be removed evenly and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material in the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Whitehall Building, New York City.

(*c*) That there shall be no unreasonable interference with navigation by the work herein authorized.

(*d*) That if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the permittee.

(*e*) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(*f*) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(*g*) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(*h*) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(*i*) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(*j*) That if the structure or work herein authorized is not completed on or before the thirty-first day of December, 1954, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

(k) That if, in the judgment of the Chief of Engineers, the said permittee does not at all times exercise due caution in the transportation of oil, gas, or other pollutive, noxious or lethal substances, to prevent conditions deleterious to health or sea food, or hazardous to navigation, or dangerous to persons or property engaged in commerce or otherwise on said waters, this permit

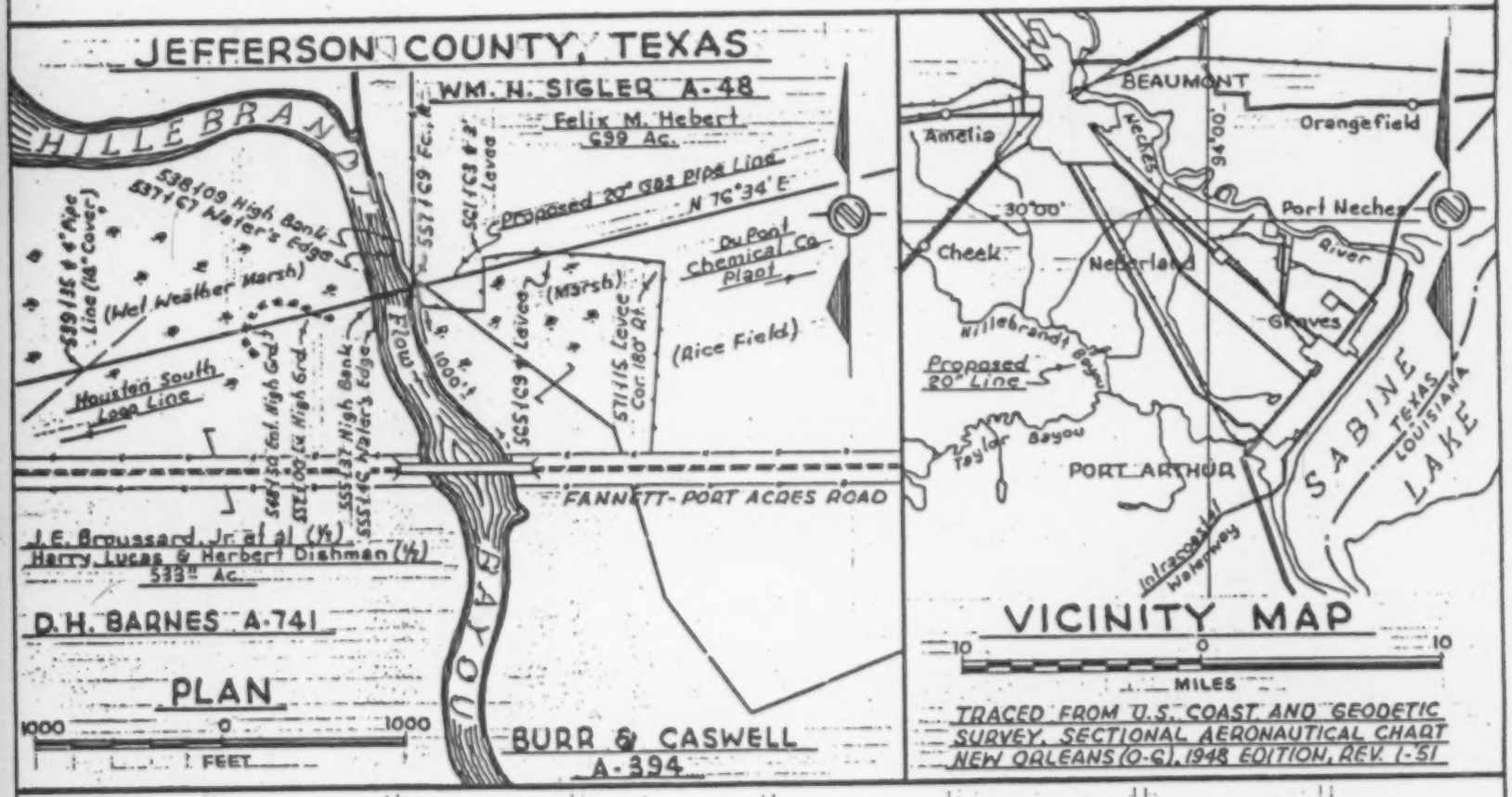
may be revoked and all operations authorized by it may be terminated.

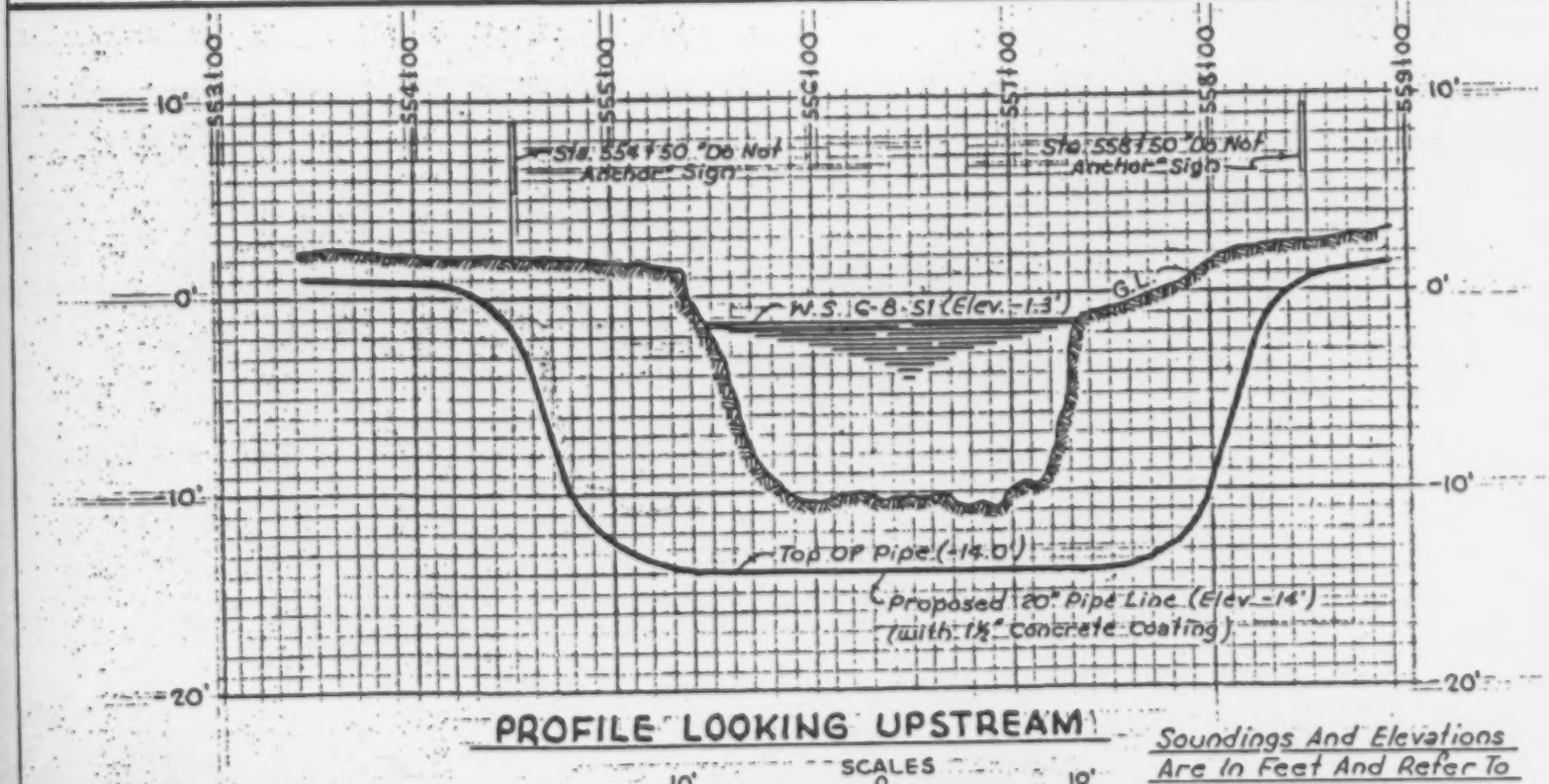
By authority of the Secretary of the Army:

FOR COLONEL J. D. LANG, DISTRICT ENGINEER:

/s/ William G. Neely
WILLIAM G. NEELY
Chief, Permit Branch

1 drawing attached





PROFILE LOOKING UPSTREAM

SCALES

Vertical 10' 0 10'

Horizontal 100' 0 100'

Soundings And Elevations Are In Feet And Refer To Mean Sea Level.

This Pipe Line To Be Used To Transport Natural Gas To Beaumont And Orange Area.

APPLICATION BY:
UNITED GAS PIPE LINE CO.
DATE: 10-11-51

PROPOSED 20" PIPE LINE ACROSS HILLEBRANDT BAYOU JEFFERSON COUNTY, TEXAS

DEPARTMENT OF THE ARMY

NOTE. – It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See *Cummings v. Chicago*, 188 U. S., 410.)

W-N-243-41-PERMIT-3779

PERMIT
Office of the District Engineer
Galveston District, Corps of
Engineers.
Galveston, Texas

18 March, 1957.

Humble Oil & Refining Company
P. O. Box 2180
Houston 1, Texas

Contract unnumbered

Gentlemen:

Referring to written request dated 22 February 1957 I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army to place a 16-inch pipe line, the dredged material from the crossing to

be placed on shore, in Hillebrandt Bayou at a location approximately 9 miles south from Beaumont, Texas, in accordance with the plans shown on the drawing attached hereto entitled, "PROPOSED 16" PIPE LINE CROSSING UNDER HILLEBRANDT BAYOU ABOUT 9 MILES SOUTH 11° WEST FROM BEAUMONT, JEFFERSON CO., TEXAS.," subject to the following conditions:

(*a*) That the work shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment the interest of navigation so require.

(*b*) That any material dredged in the prosecution of the work herein authorized shall be removed evenly and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material in the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters,

or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, New York City.

(*c*) That there shall be no unreasonable interference with navigation by the work herein authorized.

(*d*) That if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the permittee.

(*e*) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(*f*) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the

United States on account of any such removal or alteration.

(*g*) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(*h*) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(*i*) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(*j*) That if the structure or work herein authorized is not completed on or before the thirty-first day of December, 1960, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

(k) That if, in the judgment of the Chief of Engineers, the said permittee does not at all times exercise due caution in the transportation of oil, gas, or other pollutive, noxious or lethal substances, to prevent conditions deleterious to health or sea food, or hazardous to

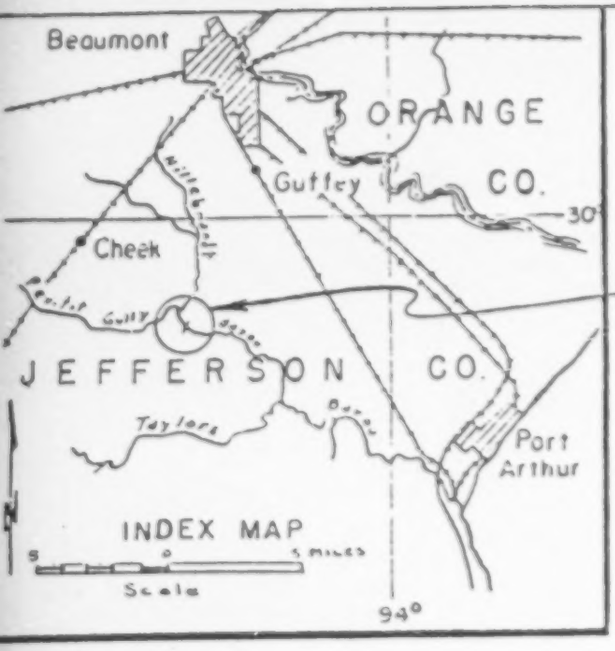
navigation, or dangerous to persons or property engaged in commerce or otherwise on said waters, this permit may be revoked and all operations authorized by it may be terminated.

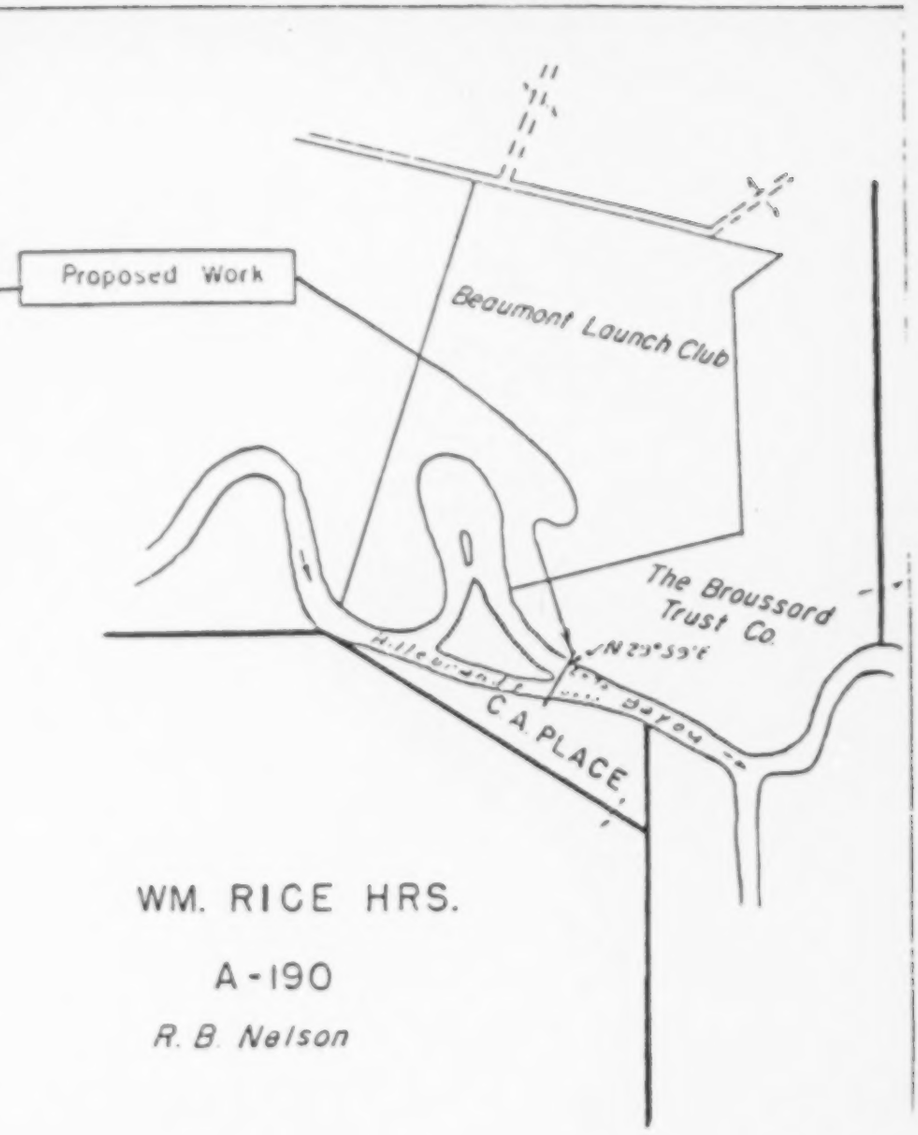
By authority of the Secretary of the Army:

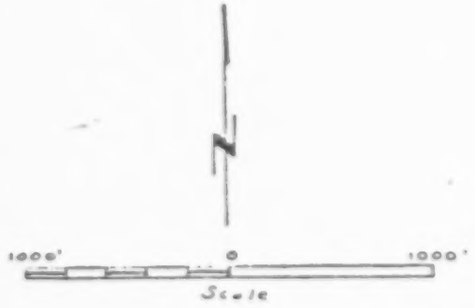
FOR COLONEL W. P. McCRONE, DISTRICT ENGINEER:

/s/ William G. Neely
WILLIAM G. NEELY
Chief, Permit Branch

1 drawing attached







WM. RICE HRS.

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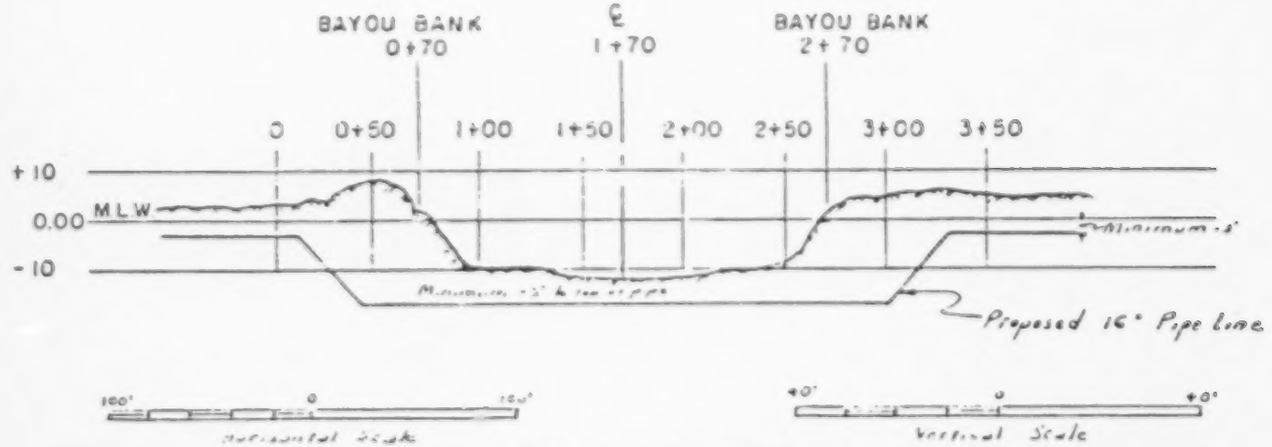
R. B. Nelson



CROSS SECTION LOOKING UPSTREAM

APPLICATION BY HUMBLE OIL & REFINING COMPANY DATED FEBRUARY 22, 1957	*PROPOSED 16" PIPE LINE CROSSING UNDER HILLEBRANDT BAYOU ABOUT 9 MILES SOUTH 11° WEST FROM BEAUMONT, JEFFERSON CO., TEXAS.*

Supreme Court, U.S.
FILED
JUN 3 1994
OFFICE OF THE CLERK

No. 93-1576

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED TEXAS TRANSMISSION COMPANY, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, AND JEFFERSON COUNTY (TEXAS) DRAINAGE DISTRICT NO. 6

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

ROBERT L. KLARQUIST
FRED R. DISHEROON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The United States Army Corps of Engineers issued permits to petitioner's predecessors in interest which authorized them to build and maintain two pipelines across the navigable waters of the United States. The permits were each issued subject to the condition that "if future operations by the United States require an alteration in the position or the structure or work herein authorized," the changes so required would be performed by the permittee without expense to the United States.

Years later, the Corps commenced a project that required changes in the location of petitioner's pipelines, both within, and to some extent outside, the present channel. The Corps directed petitioner to relocate the pipelines. Petitioner, however, refused to do so unless it first received assurance that it would be reimbursed for all, or almost all, of the relocation costs. Although the Corps informed petitioner that its position violated the permits, petitioner adhered to its position. Eventually, the Corps cancelled the permits.

The question presented is whether the Corps of Engineers properly cancelled the permits due to the permittee's refusal to relocate the pipelines unless it first received assurances that it would be reimbursed for costs of relocation.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1576

UNITED TEXAS TRANSMISSION COMPANY, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, AND JEFFERSON COUNTY (TEXAS) DRAINAGE DISTRICT NO. 6

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16-41) is reported at 7 F.3d 436. The memorandum opinion of the district court (Pet. App. 42-48) is reported at 772 F. Supp. 952.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1993. A petition for rehearing was denied on January 5, 1994 (Pet. App. 1). The petition for a writ of certiorari was filed on April 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT [1]

1. Petitioner maintained two pipelines across Hillebrandt Bayou, a navigable water of the United States, in Jefferson County, Texas. A 20-inch pipeline was installed pursuant to United States Army Corps of Engineers (Corps) Permit 1728, issued on November 13, 1951, to United Gas Pipeline Company, petitioner's predecessor in interest. A 16-inch pipeline was installed pursuant to Corps Permit 3779, issued in March 1957 to Humble Oil and Refining Company, also a predecessor in interest to petitioner. Both permits contained Condition (F) (Pet. App. 89), which required permittees to remove, relocate or alter the structural works "if future operations by the United States require an alteration in the position of the structure or work herein authorized." *Id.* at 50.

2. On October 27, 1965, Congress authorized construction of the Taylors Bayou Flood Protection Project in Section 204 of the Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1074, 1078 (Pet. 4). The Taylors Bayou Project is designed to alleviate serious flooding problems in southeastern Texas (Pet. App. 17).

On August 22, 1972, the United States and Jefferson County Drainage District No. 6, the Project's local sponsor, entered into a Local Cooperation Agreement[2]

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[1] The facts in the following statement are, except as otherwise noted, taken from the Finding of Fact made by the District Engineer. Those Findings of Fact are reproduced at Pet. App. 49-75.

[2] Such an agreement is a statutory prerequisite to construction of a federal flood control project. Under the agreement, the local sponsor assumes certain specified responsibilities identified in Section 3 of the Flood Control Act of 1936, 33 U.S.C. 701c,

concerning the Project. This agreement set forth the terms upon which the federal government and the District were to cooperate in constructing the Project.

In the late 1980's, when work began on the Hillebrandt Bayou portion of the Project, the Corps notified petitioner that the Project involved realigning, widening, and deepening portions of the Hillebrandt Bayou, and that petitioner's two pipelines would interfere with construction of the Project. Accordingly, the Corps notified petitioner in February 1987 that, if it desired to continue to maintain its pipelines across the Bayou, the pipelines would be required to be lowered because they interfered with Project specifications. Those specifications mandated "that existing pipelines that are not at least 5 feet below the design depth of the channel over the bottom width plus a distance of 25 feet on each side will have to be lowered" and that "[a]ny relocated pipelines are required to be at least 10 feet below the design depth of the channel over the bottom width plus a distance of 25 feet on each side." Gov't C.A. Br. 8.

The Corps also advised petitioner that the relocation of the pipelines would have to be accomplished at no cost to the government in accordance with permit Condition (F) and pursuant to the dominant servitude held by the United States with regard to the navigable waters of the United States, of which Hillebrandt Bayou is a part.

The Corps again notified petitioner, by letters dated April 20, 1988, and July 5, 1988, that it would be required to relocate its pipelines at no cost to the United States in order for the Project to be constructed. Petitioner did not dispute that the current locations of its pipelines

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including responsibility for the costs of any necessary relocations of facilities.

conflicted with Project specifications within the navigable waters of Hillebrandt Bayou. It also recognized the Corps' jurisdiction over the navigable waters of the Bayou and its attendant obligation to relocate those portions of its pipelines in the navigable waters. Petitioner advised the Corps and the District, however, that it would not relocate its pipelines until it was assured of compensation from the Drainage District for the costs of relocation for at least the portion of its pipelines that were outside the navigable waters of the Bayou.[3]

On February 13, 1989, the Corps determined that petitioner's refusal to lower the pipelines was interfering with completion of the Project. Pursuant to 33 C.F.R. Pt. 325, the Corps instituted proceedings to address petitioner's violation of the permit conditions. The first step in this procedure was the temporary suspension of the relevant pipeline permits. Accordingly, by letter of February 14, 1989, the District Engineer notified petitioner that its permits were suspended as of that date. The suspension letter advised petitioner of its right to request a public hearing, after which appropriate action would be taken to reinstate, modify, or revoke the permits, and that if the permits were revoked,

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[3] The exact extent to which the requisite relocation work would involve portions of the pipelines situated in the existing channel was not determined by the courts below. Throughout this litigation, petitioner has been inconsistent and imprecise concerning the extent to which it sought assurances that it would be reimbursed for its relocation costs. At times petitioner asserted that it was entitled to be compensated for all costs associated with the relocations, while at other times it at least implicitly acknowledged its responsibility for bearing a portion of the relocation expenses. See Pet. App. 47, 54-56.

the pipelines would have to be completely removed from the waterway at petitioner's expense.

Petitioner requested a public hearing, which was held on June 28, 1989. Petitioner's position was presented at this hearing, as well as in petitioner's follow-up letter of July 7, 1989. Petitioner stated that it recognized and continues to recognize the Corps' jurisdiction over the navigable waters of Hillebrandt Bayou, and that it was willing to "relocate its pipelines within the Bayou to the extent necessitated by the current Taylors Bayou flood control project and to bear all costs of such relocation." Pet. App. 61.

Petitioner maintained, however, that because the Project involved widening as well as deepening Hillebrandt Bayou, pipeline relocation was "necessary 'within the bayou and outside the bayou.'" Pet. App. 61. Petitioner insisted that a "partial relocation" of the pipelines "within the streambed of Hillebrandt Bayou" would be "a futile exercise that would not advance the progress of the flood control project." *Ibid.* The letter also stated that petitioner "cannot be in noncompliance with its permits if the purported acts of compliance would not satisfy the demand on which the Corps bases its permit suspension and revocation actions." *Ibid.* Petitioner contended that, under the Flood Control Act of 1965 authorizing the Taylors Bayou Project, it was entitled to compensation for pipeline relocation supposedly outside the Hillebrandt Bayou. Ignoring possible Tucker Act, 28 U.S.C. 1491, remedies in what is now the Court of Federal Claims, petitioner also asserted that revocation of the permits would coerce petitioner into proceeding with relocation demands and surrendering its constitutional rights to compensation from the Drainage District for the supposed taking of its private property rights outside the Bayou.

3. Before any further action was taken by the Corps concerning the permits, petitioner on July 20, 1989, filed a complaint in the United States District Court for the Southern District of Texas against the Corps and the Drainage District, challenging the suspension and threatened revocation of the permits. On motions of the Corps and the District, venue was transferred to the Eastern District of Texas.

On August 13, 1990, the District Engineer issued his determination regarding petitioner's permits. The District Engineer ruled that, pursuant to 33 C.F.R. 325.7, the public interest would best be served by revocation of the permits so that work on the Taylors Bayou Project could continue. After revocation, the Corps notified petitioner that it must remove its pipelines from Hillebrandt Bayou.

On October 15, 1990, the United States filed in the district court a counterclaim against petitioner seeking an order requiring petitioner to remove the pipelines and for damages. All parties filed motions for summary judgment. The sole issue raised by petitioner's motion for partial summary judgment was that the Corps' use of its permit power to revoke petitioner's permits resulted in a taking of petitioner's property rights under the Fifth Amendment. The United States' summary judgment motion, relying upon Section 12 of the Rivers and Harbors Act of 1899, 33 U.S.C. 406, sought an order directing petitioner to remove its pipelines from Hillebrandt Bayou.

The district court denied petitioner's motion for summary judgment, granted the United States' request

for injunctive relief, and directed that petitioner remove its pipelines from the Bayou.[4] Petitioner appealed.

4. The court of appeals affirmed, holding that petitioner had no legal justification for failing to comply with the Corps' order directing the relocation of the pipelines to accommodate the project, and thus the Corps did not abuse its discretion in revoking the permits after petitioner failed to comply. The court also held that, as a consequence of the revocation of the permits, petitioner lost the opportunity to relocate its pipelines, leaving itself no alternative but to remove the pipelines that conflicted with the project specifications.[5]

ARGUMENT

The petition for a writ of certiorari does not present any important issue of federal law, does not involve a conflict in decisions between courts of appeals, and does not present any question warranting review by this Court.

1. Petitioner contends that the Corps acted beyond its statutory authority in seeking to have petitioner relocate its pipelines without first assuring petitioner of compensation for costs associated with that move. There is no reason for this Court to consider that contention, however, because petitioner's claims on that score are either moot or beyond the district court's jurisdiction.

A case becomes moot, and thus nonjusticiable, "when the issues presented are no longer 'live'." *United States*

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[4] The court also severed an unresolved Freedom of Information Act claim and the defendants' remaining counterclaims from this case. See Gov't C.A. Br. 1-2, 4 n.2.

[5] The court of appeals (Pet. App. 36), in *dicta*, concluded that the Corps' revocation orders would result in a taking of petitioner's property interests in pipeline located in substantial areas outside of the permitted area.

Parole Comm'n v. *Geraghty*, 445 U.S. 388, 396 (1980). As the court of appeals noted (Pet. App. 23 n.9), the removal of the two subject pipelines from the waterway was completed in July 1992.[6] Thus, there is no effective injunctive relief that any court can grant as to those pipelines, even if the Corps were found to have exceeded its authority. Any ruling by this Court would be, at best, an advisory opinion.

Reduced to its essentials, this case now (as before the court of appeals) involves only a claim by petitioner for monetary compensation. In its motion for partial summary judgment, the sole issue raised by petitioner against the Corps was a demand that it be assured of compensation:

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[6] On June 1, 1993, the court of appeals, *sua sponte*, ordered the counsel of record to file an "agreed fact statement, to be submitted jointly," regarding "the current status of the pipelines and a portion of the widening and deepening project in the vicinity of the pipelines, i.e., whether that part of the work is still on hold or has gone forward." The statement, dated June 9, 1993, states in relevant part:

> Removal of [petitioner's] 16" pipeline was completed on April 29, 1992.
>
> Removal of [petitioner's] 20" pipeline was completed on July 2, 1992.
>
> As of the date of this stipulation, Hillebrandt Bayou at the former location of the 16" pipeline has not been dredged or otherwise altered to meet the project specifications.
>
> As of the date of this stipulation, Hillebrandt Bayou at the former location of the 20" pipeline has not been dredged or otherwise altered to meet the project specifications.
>
> As of the date of this stipulation, that part of the work is not on hold.

> [Petitioner] is entitled to judgment as a matter of law as to the following issue[] in this case: * * *
>
> The United States Army Corps of Engineers' * * * wrongful use of "permit power" under § 10 of the Rivers and Harbors Act of 1899, in an attempt to compel [petitioner] to relocate its pipelines without assurance of * * * compensation from the Drainage District.

Indeed, the district court stated that the only question to be decided was, "[W]hat entity is responsible for paying to relocate or alter pipelines constructed in an area that is now the subject of a federal flood control project?" (Pet. App. 45). The district court, however, had no jurisdiction to adjudicate a claim for compensation by petitioner against the United States.

Under the Tucker Act, 28 U.S.C. 1491, any such claim in excess of $10,000 must be brought in the Court of Federal Claims. Since the relocation of the pipelines was sought by the United States, it would be responsible, at least initially, for relocation costs if any were owed. And, because the amount in controversy exceeded $10,000,[7] petitioner filed its suit for monetary relief in the wrong court.[8] Consequently, the Tucker Act provides the sole remedy for any Fifth Amendment

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[7] The court of appeals noted (Pet. App. 19) petitioner's representation that the amount in controversy was $1,060,000. See also Pet. C.A. Br. 5.

[8] For this reason, petitioner's arguments (Pet. 25, 26) that the court of appeals' decision is contrary to this Court's opinion in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), is in error. Contrary to petitioner's reading of *Kaiser*, "[t]he Fifth Amendment does not require that compensation precede the taking." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984) (citing *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932)).

taking alleged to have been committed by the United States, *Preseault* v. *ICC*, 494 U.S. 1, 13 (1990), and the removal of the pipelines by petitioner moots any equitable claim that the actions of the United States complained of here were unauthorized.[9]

2. Jurisdictional matters aside, petitioner could not validly postpone relocation work required by Condition (F) based on its outstanding demand for assurances from the Drainage District that it would be reimbursed for its relocation expenses, either in whole or in part. This refusal violated Condition (F) of the permits. Condition (F), Pet. App. 89, requires permittees to "remove or alter" their permitted structures whenever "operations by the United States" so require. The "operations by the United States" in this case were activities performed in furtherance of the Taylors Bayou Flood Control Project, and the specifications for that project required relocation of the pipelines—both within the existing channel and elsewhere.

3. Petitioner's contention (Pet. 25-26) that Condition (F) did not apply with respect to any portion of its pipelines supposedly on fastlands outside such navigable

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[9] Because petitioner's claims on the merits are not worthy of review, the procedure applicable to cases that become moot while pending in this Court (see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950)) is inapplicable, and certiorari should simply be denied. See U.S. Br. in Opp. at 5-8, *Velsicol Chem. Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900); see also U.S. Br. as Amicus Curiae at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (No. 92-1123). While the court of appeals in this case could appropriately have vacated the district court's judgment as moot, the petition for certiorari does not present that claim and it therefore should not be considered by this Court. Sup. Ct. R. 14.1(a).

waters misses the mark.[10] It was established in the administrative record, and particularly in the District Engineer's Statement of Findings (Pet. App. 49-75), that petitioner was *not* in compliance with its permits *within* the navigable waters of Hillebrandt Bayou subject to Project specifications, a point which petitioner never disputed before the Corps.[11] Petitioner's refusal to relocate any portions of its pipelines was based on its claim that it need not do so until it was assured of compensation for the relocation costs, notwithstanding the permit conditions. This refusal was, as the court of appeals found, a sufficient basis for permit revocation, regardless of the exact extent of navigable waters in the Bayou. Hence, petitioner was in error in refusing to comply with Condition (F) unless it received prior assurances that it would be compensated for the relocation work necessitated by the project.[12]

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[10] This purely factual issue also does not warrant review. As discussed above, that issue is moot because petitioner has completed the removal of the pipeline. Additionally, the district court concluded that the Corps' order affected, at most, "incidental work" on lands adjoining the Bayou. Pet. App. 47. Consequently, the court only ordered the "removal of the pipelines pursuant to the valid revocation of the permits." *Id.* at 48.

[11] The administrative record states that both of petitioner's pipelines were "at least five (5) feet below the bed of the waterway." Gov't C.A. Br. 24 (quoting R.E. Tab E 12). Additionally, "[t]he record of this case clearly proves that the lateral extent of Hillebrandt Bayou, subject to the servitude, encompassed essentially all of the area in which the Corps initially requested petitioner to lower its pipelines. Petitioner presented no evidence at all in rebuttal." *Id.* at 21-22. See also *id.* at 30-33.

[12] Petitioner also suggests (Pet. 27 n.16) that the Corps cannot impose conditions in a permit issued pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, unless those conditions directly pertain to navigational matters. Petitioner's

4. Petitioner is also wrong in asserting (Pet. 22) that it has any rights under Section 3 of the Flood Control Act of 1936, ch. 688, 49 Stat. 1571, 33 U.S.C. 701c, or under the Local Cooperation Agreement between the Corps and the Drainage District, to receive compensation for relocation activities which could otherwise be compelled by the Corps under its Condition (F) authority. The clear purpose of the Act and the Local Cooperation Agreement in regard to payment for relocation of utilities was to insure that the United States would not ultimately be responsible for certain costs. Section 3 merely provides that the local sponsoring authorities must give the Corps assurances that they will provide "without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project." Petitioner has not shown, and cannot show, that the Act or the agreement requires the local sponsor to provide prior assurances to utilities such as petitioner that it will reimburse them for relocation costs. As to the agreement here, the district court correctly observed (Pet. App. 47) that:

> a reasonable interpretation of that agreement only requires that the District pay to acquire those rights-of-way or easements that are not acquired through the power of the Corps, the District's

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suggestion is incorrect. The Corps may deny applications for Section 10 permits for reasons unrelated to navigation. *United States* v. *Alaska*, 112 S. Ct. 1606, 1611-1613 (1992); *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352 (1933); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). If the Corps may deny a Section 10 permit request as an initial matter for concerns unrelated to navigation, then it follows that the Corps can also grant the request subject to conditions unrelated to navigation. *Alaska*, 112 S. Ct. at 1618.

partner, and jointly responsible for execution of the Congressional mandate that the project be completed.

Further, the statute and the Local Cooperation Agreement are for the sole benefit of the United States and do not inure to the benefit of petitioner. If the United States was initially required to pay for any relocation of pipelines, it might by this agreement be able to recover those sums from the Drainage District. But, as just mentioned, federal law does not require the District to provide prior assurances that it will reimburse petitioner for any costs in connection with the Project. Accordingly, petitioner is not a third party beneficiary of the statute or agreement and it cannot maintain an action thereunder against the District. See *Berberich* v. *United States*, 5 Cl. Ct. 652, 656-658 (1982), aff'd mem., 770 F.2d 179 (Fed. Cir. 1985) (Table).

5. Petitioner's reliance (Pet. 26-29) on *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), is misplaced. In *Nollan*, this Court held that a state governmental entity could not circumvent the Fifth Amendment's obligation to pay just compensation for taking of private property for public use through the device of making permits for the rebuilding of structures on private beachfront lots conditional upon the granting of public access to the beach. In the current litigation, however, the court of appeals did not find that the federal government could avoid all potential takings liability by making a permit to install a portion of a pipeline in the navigable waters conditional on absolving the United States from any future liability for the costs of relocating all portions of that pipeline outside of the navigable waters. To the contrary, the court of appeals specifically found (Pet. App. 34) that, under petitioner's permits, "the government is clearly obliged to pay the expense of

substantial relocations wholly outside the original banks." Hence, *Nollan* has no application in the present suit.

6. Finally, petitioner incorrectly asserts (Pet. 25-26) that the court of appeals' decision here conflicts with the Eleventh Circuit's opinion in *United States* v. *Harrell*, 926 F.2d 1036 (1991), which addressed whether a certain tributary of a navigable river was itself navigable. Because the court of appeals here did not hold, as petitioner argues, that the navigation servitude extends to fastlands, *Harrell* has no relevance here. Indeed, the authorizing Act in this case explicitly states a navigational purpose. Flood Control Act of 1965, Pub. L. No. 89-298, § 204, 79 Stat. 1074 ("The following works of improvement[, including the Taylors Bayou Project,] for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted."). See Gov't C.A. Br. 42.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 93-1576

In The

Supreme Court of the United States

October Term, 1993

UNITED TEXAS TRANSMISSION COMPANY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS and JEFFERSON COUNTY (TEXAS) DRAINAGE DISTRICT NO. 6,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. When Congress has conditioned its approval of and appropriation of funds for a flood control project upon a requirement that the project's "local sponsor" acquire all lands and easements and make all necessary utility relocations, may the U.S. Army Corps of Engineers, invoking conditions found in pipeline permits issued pursuant to § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), nonetheless require pipeline owners to relocate their pipelines without invoking eminent domain authority? *See Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed 2d 332 (1979).

2. When a flood control project's local sponsor fails to acquire the necessary property and make the necessary utility relocations it has undertaken to acquire and/or perform, may the Corps, in lieu of resorting to a statutory condemnation proceeding, utilize conditions found in pipeline permits issued pursuant to § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) to require pipeline owners to relocate pipelines both within and outside the geographical areas subject to such permits? *See Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed 2d 332 (1979).

3. By holding that the Corps' permit powers under § 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) confer authority upon the Corps in fast lands outside the "permitted area" and the area subject to the federal navigational servitude, has the Fifth Circuit extended such powers beyond their lawful reach?

QUESTIONS PRESENTED – Continued

4. By holding that the Corps could rely upon permit conditions to demand relocations of sections of pipelines not within the permitted area in order to facilitate the construction of a flood control project having no navigational purpose, has the Fifth Circuit interpreted such conditions consistently with this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987)?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner United Texas Transmission Company ("UTTCO") presents the following Reply to the Briefs of the Federal Respondent and the Local Drainage District:

STATEMENT

In its statement of the case, Respondent Jefferson County Drainage District No. 6 (the "District") states that Congress approved the Taylors Bayou Flood Control Project for purposes of navigation, citing only to global, precatory language in the Flood Control Act of 1965 having no specific reference to this project. (District's Br. p. 4).[1] Perhaps because it is more familiar with the terms of the authorizing legislation than its local counterpart, the Federal Respondent concedes that "[t]he Taylors Bayou Project is designed to alleviate serious flooding problems in Southeastern Texas". (Federal Brief, p. 2). The Federal Respondent's brief does, nevertheless, mischaracterize UTTCO's position regarding the District's liability for the relocation costs of the project.[2]

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[1] To buttress these claims, it represents that the Corps has estimated that the "project will improve . . . navigational capability" and asserts the project will result in the widening and deepening of navigation locks on Taylors Bayou. (*Id.*) There is no evidence in the record to support these representations. In fact, the record flatly contradicts them. The Report of the Acting Chief of Engineers included as part of House Document No. 206 (89th Congress) states with reference to Taylors Bayou that "navigation of the bayou is not extensive and prospective commerce is insufficient to justify provision of a new larger lock". (App. 82). With reference to Hillebrandt Bayou – the appropriate focus of the case at bar – the same report states that "the problem is to provide sufficient capacity for the conveyance of flood runoff from the improved channel." (App. 82). In this report, the Acting Chief Engineer "recommended improvement of Taylors Bayou, Texas for *flood control and drainage*" and only on the condition that the Local Sponsor (the District) would "make all necessary alterations and relocations of structures and utilities". (App. 84). Congress approved the project *expressly* upon these recommendations. Title II (entitled "Flood Control") § 204, Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (1965).

[2] The Federal Respondent's brief states in a footnote that UTTCO has, on occasion, "acknowledged its reponsibility for bearing a portion of the relocation

REPLY TO FEDERAL RESPONDENT'S ARGUMENT

The Federal Respondent concedes that the Fifth Circuit "concluded that the Corps' revocation orders would result in a taking of [UTTCO's] property interests in pipeline located in substantial areas outside of the permitted area". (Federal Brief, p. 7, n.5).[3] However, the Federal Respondent argues that there is nothing that may be done at this point to remedy this taking because (1) any claim for monetary relief is irrelevant because UTTCO failed to file suit in the court capable of granting such relief; and (2) any viable claim for equitable relief that UTTCO had is now rendered moot by the fact that UTTCO removed the pipelines after being ordered to do so by the District Court.

UTTCO's response is two-fold: (1) the District Court was unquestionably the proper forum in which to sue the Federal and Local Defendants for unauthorized and unlawful exercise of permit powers; and (2) the fact that equitable claims UTTCO asserted may be moot is immaterial given the assertion of the claims for money damages.

The argument that UTTCO filed suit in the wrong court is based upon the notion that UTTCO should have filed suit against the United States in the Court of Federal Claims under the provisions Tucker Act. This claim is specious. The Court of Federal Claims has jurisdiction over taking claims against

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expenses." (Federal Brief, p. 4, n.3). In point of fact, UTTCO's position *with respect to the District* is and always has been that the District is responsible under the Flood Control Act of 1965 for the entire cost of relocating pipelines and other utilities. Obviously more familiar with UTTCO's claims against the District than the Federal Respondent, the District correctly notes that UTTCO responded to the relocation demands by claiming that it was entitled to "be reimbursed for the entire cost of relocation" and then "remained fast in its position". (District Brief, p. 5).

[3] The Federal Respondent describes the Fifth Circuit's conclusion as "*dicta*". The conclusion of the Fifth Circuit in this regard is anything but *dicta*. As a necessary element of one of the claims UTTCO asserted in that court, the Fifth Circuit was required to decide whether all or a substantial portion of the pipelines the Corps was demanding UTTCO to relocate (under so-called permit powers) in fact lay outside the permitted area. The Fifth Circuit concluded that substantial portions of the pipelines did in fact lay beyond the reach of both permit conditions and navigational servitude. By definition, such a conclusion did not constitute "*dicta*".

the United States *only when the taking is authorized.* The proper forum to litigate claims that officers of the United States took property *without* authorization is a federal district court. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) cert. denied, 479 U.S. 1053 (1979).[4]

The argument that UTTCO's claim for equitable relief against the United States is now moot is simply irrelevant. While briefly noting that this case does involve a claim for money damages[5] (Federal Brief, p. 8) the Federal Respondent neglects to explain that UTTCO has numerous claims for monetary relief against both Federal and Local Defendants (including Corps officers Joseph Trahan, John Tudela, and Brink Miller) that will be directly affected by the Fifth Circuit's opinion.[6] While not expressly addressing the merits of those claims, the Fifth Circuit's opinion will – unless set aside by this Court – necessarily preclude further assertion of the claims for monetary relief against the Corps officials because (1) the opinion concludes that the Corps had legal authorization to utilize permit powers to take UTTCO's property; and (2) UTTCO's claims against the individual defendants are predicated upon their alleged lack of authority to order UTTCO to relocate or remove its lines. Due to the

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[4] Indeed, in *Florida Rock* the Corps of Engineers took the position that a federal district court is the *only* appropriate forum for challenges to its exercise of nonexistent authority. UTTCO has consistently argued throughout this case that the Corps' use of permit powers to compel relocations that the Local Sponsor was required to make is unauthorized and unlawful. The Federal Respondent's claim that UTTCO should have gone to the Court of Federal Claims assumes that its position on the very issue in dispute is the correct one (i.e. that the Corps' permit powers provided authorization for taking UTTCO's property outsided the permitted areas). Had UTTCO filed suit in the Court of Federal Claims – as the Federal Respondent suggests – the claim could have been successfully defended on the grounds that the acting Corps officials had no authority to invoke permit conditions to relieve the Local Sponsor's financial burdens. *Florida Rock*, supra.

[5] These claims are also referenced in the District Court's opinion. (App. 42).

[6] When it granted the Federal and Local Defendants' Motions for Partial Summary Judgment, the District Court severed all pending claims for monetary relief so as to facilitate UTTCO's immediate appeal of the judgment that UTTCO was required to relocate its pipelines under permit conditions.

existence of these claims for monetary relief, the fact that the equitable claims may be moot is of no consequence. *University of Texas v. Camenisch*, 451 U.S. 390, 101 S. Ct. 1830, 68 L.Ed. 2d 175 (1981).

Turning to a discussion of the merits, the Federal Respondent – apparently unable to devise any convincing response to the arguments UTTCO has made – resorts to the tactic of mischaracterizing UTTCO's contentions into a claim that is more easily countered. The Federal Respondent attempts to contort UTTCO's argument into a claim that one is entitled to compensation before surrendering property to the government: "Petitioner contends that the Corps acted beyond its statutory authority in seeking to have petitioner relocate its pipelines without first assuring petitioner compensation for costs associated with that move". (Federal Brief, p. 8). Having changed UTTCO's argument into one it has not asserted, the Federal Respondent then attempts to address (in a footnote) the patent conflict between the Fifth Circuit's opinion and *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed 2d 332 (1979) with the platitude that "the Fifth Amendment does not require that compensation precede the taking". (Federal Brief, p. 9, n.8).

UTTCO's argument is not that the Corps lacked authority because it failed to offer compensation. To the contrary, UTTCO acknowledges that there were statutory procedures available to the Corps which could have been readily invoked without prior compensation or an assurance of such. See 33 U.S.C. §§ 593, 594. Rather, UTTCO's argument is that the Corps' "permit powers" provided no authority whatsoever for either the acquistion of UTTCO's property or the compelled relocation of UTTCO's pipelines, because (1) the obligation for relocating pipelines and acquiring easements and rights-of-way was allocated to the project's Local Sponsor; (2) permit powers may not be used as a surrogate for statutory procedures established for situations in which the Local Sponsor fails or refuses to meet its obligations. The principle that compensation need not precede the taking is immaterial to

this argument. In fact, this principle assumes and is predicated upon the existence of *authority* and the proper invocation of authority to take property. Without legal warrant for the involuntary acquisition of property, the fact that compensation is assured or not is simply beside the point.

Just as it has failed to respond to UTTCO's argument, the Federal Respondent has not addressed the conflict between *Kaiser Aetna* and the opinion of the Fifth Circuit. *Kaiser Aetna* holds that when the Goverment wishes to acquire fast lands it is required to resort to condemnation procedures, and it may not rely upon its authority under § 10 of the Rivers and Harbors Act of 1899 in lieu of such proceedings. Though acknowledging that "the scope of the Corp's authority under [the § 10 permits] to demand relocation of the pipelines at the expense of the permit holder is at the heart of this lawsuit" (App. 19), the Fifth Circuit proceeded to opine that the Corps' ability to assert this authority over fast lands was an "undeniable and undenied" proposition. (App. 39). Nowhere in its brief does the Federal Respondent even attempt to reconcile the Fifth Circuit's observation with *Kaiser Aetna*.

In an attempt to defuse the obvious conflict, the Federal Respondent instead makes the incredible suggestion that the fact that a substantial portion of the pipelines lay in fast lands outside the reach of the permit powers is a mere "contention" of UTTCO's that raises a "purely factual issue" not warranting review (Federal Brief, p. 10 and p. 11, n.10). Citing to nothing more authoritative than an unsuccessfully asserted argument from its own brief in the Fifth Circuit, the Federal Respondent further suggests that all of the sections for which relocation was required in fact lay within the streambed, not in fast lands. (Federal Brief, p. 11, n.11). That a substantial portion of the pipelines requiring relocation lay outside the streambed in fast lands is not a mere "contention" of UTTCO's. On the record before it, the Fifth Circuit explicitly found that a substantial portion of the pipelines requiring relocation rested outside the permitted area in fast lands.

(App. 35).[7] The conflict between the Fifth Circuit's resolution of this controversy and *Kaiser Aetna* is obvious.

REPLY TO LOCAL DRAINAGE DISTRICT'S ARGUMENT

While also apparently incapable of addressing the arguments UTTCO has presented to this Court, the District takes a somewhat different approach. The problem is not with UTTCO's arguments, the Court is told, but with the "insupportable" and "baseless" underlying assumptions upon which those arguments are founded. (District Brief, pp. 9-10). Implicit in this approach is a concession that if the underlying assumptions are in fact valid, the arguments upon which they are based have merit.

The first so-called "insupportable" assumption that the District identifies is that "Congress conditioned approval of an appropriation of funds for a flood control project upon a requirement that the project's local sponsor acquire all lands and easements and make all necessary utility relocations". (District Brief, p. 9). Failing to keep its story consistent with that profferred by its local partner in the project, the Federal Respondent expressly acknowledges the validity of the very proposition that the District decries as baseless. Referring to the Local Cooperation Agreement (in which the District explicitly assumed the responsibility for relocating pipelines), the Federal Respondent states:

> "Such an agreement is a statutory prerequisite to construction of a federal flood control project. Under the agreement, *the local sponsor assumes certain specified responsibilities identified in Section 3 of the Flood Control Act of 1936*, 33 U.S.C. 701c, *including responsibility for the costs of any necessary relocations of facilities.*"

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[7] In the process of so deciding, the Fifth Circuit flatly rejected the very argument the Federal Respondent now attempts to revive from its own brief in that court. (App. 30-31). UTTCO agrees with the observation that this issue does not warrant revisitation. As the Fifth Circuit held, this case does involve the compelled relocation of substantial portions of pipeline lying in fast lands.

(Federal Brief, p. 2, n.2, emphasis added). Indeed, the requirement that the Local Sponsor "make all necessary alterations and relocations of structures and utilities" is explicitly stated in the Acting Chief Engineers' report (App. 84), and Congress specifically relied upon these recommendations and incorporated them into its approval of the project. Title II (entitled "Flood Control") § 204, Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (1965). If Congress did not impose this potentially massive obligation upon the District, then why would the District have expressly undertaken to relocate utilities in the Local Cooperation Agreement and why would it have subsequently agreed to indemnify the Corps for damages assessed because of the invocation of permit powers against pipeline owners? Further, as the Fifth Circuit acknowledged, the sections of pipeline placed in fast lands were placed there under "easements and rights-of-way" (App. p. 43), which property interests were taken pursuant to the Corps' exercise of permit power. The District cannot deny its obligation to acquire and pay for such property rights. 33 U.S.C. § 701c.

The second proposition with which the District takes issue is that it "failed to acquire the necessary property and make the necessary utility relocations it had undertaken to acquire or perform". The evidence is uncontroverted that the District either failed or refused to make the only pipeline relocations at issue in this case (i.e UTTCO's two pipelines), and that it failed or refused to acquire the easements and rights-of-way in the fast lands in which these pipelines were situated.[8] The fact that it entered into a Local

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[8] The project was approved in 1965. Work commenced in 1982. Contrary to the Districts' representations, the Corps did *not* initiate contact with UTTCO regarding its pipelines "when work began" (i.e. in August, 1982). (District's Brief, p. 4). As noted in the District Court's opinion, the Corps initiated contact with UTTCO in May, 1986 (almost four years after work had begun), and the District, the Corps, and UTTCO continued to argue over who was responsible for making the relocations for "approximately two years". (App. 42-44). It was during the period of time between the commencement of work in 1982 and early 1989 (when the permits were intitially suspended) that the District, claiming it was financially strapped, engaged in protracted behind-the-scenes lobbying in an effort to persuade the Corps to use its permit powers against pipeline owners. Obviously, the District both failed and refused to make the necessary relocations. If it had fullfilled its obligations, this dispute would have never arisen.

Cooperation Agreement did not – as the District seems to suggest – satisfy all of its obligations under the statute authorizing the project (District Brief, p. 10) for the simple reason that the District then proceeded not to perform its contractual obligations.

The District also disputes the proposition that the Fifth Circuit "held that the Corps' permit powers conferred authority upon the Corps in fastlands outside the 'permitted area' and the area subject to the federal navigational servitude." The Fifth Circuit stated that the Corps' permit powers were "at the heart of this lawsuit". (App. 19). In the course of its opinion, it discussed no authority for the Corps' actions other than permit powers and federal navigational servitude. It would have been pointless for the Fifth Circuit to discuss any other source of federal authority (such as eminent domain) because no other such authority was ever invoked by the Federal Respondent. The Fifth Circuit then held that "the Corps has the absolute authority to order relocations in the fastlands too", describing this notion as an "undeniable (and undenied) proposition". (App. 39). Since no legal authority other than permit powers and federal navigational servitude was addressed or was even at issue in the case, the Fifth Circuit's holding regarding the Corps' alleged "absolute authority" could only have pertained to either the Corps' permit powers or the navigational servitude.[9]

The last of the four so-called "baseless" and "unsupportable" assumptions with which the District takes issue is that the project has "no navigational purpose". The very case the District cites with reference to this argument indicates that, in determining the purpose of such a project, the Court considers not a general statement of purpose appearing in the legislation but the relevant House Document. *United States v. Twin City Power Co.*, 350 U.S. 222, 75 S.Ct. 259, 100 L.Ed. 240 (1956); *see also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950) (stating that the Court has never been guided by such general statements of legislative purpose). The relevant portions of

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[9] Furthermore, the Fifth Circuit did not – as the District flatly misrepresents – find that the required relocations in fast lands were "incidental". (District Brief, p. 13). In fact, the Fifth Circuit rejected this very argument and specifically stated that these relocations were *not* "incidental" but "substantial" in nature. (App. 35).

House Document No. 206 belie the existence of any navigational purpose to the work on Hillebrandt Bayou. (App. 79-88). Futhermore, the specific legislation pertaining to the Taylors Bayou Project clearly identifies it as a project for flood protection.[10] The Federal Respondent acknowledges that the purpose of the project was flood control, and that the project was treated as one for flood control in imposing the requirement of local cooperation. (Federal Brief, p. 2 and p. 2, n.2).

Although it takes issue with what it calls "assumptions" underlying UTTCO's arguments, the District offers almost nothing to counter the arguments themselves. It attempts to address the conflict between *Kaiser Aetna* and the Fifth Circuit's opinion with one conclusory statement denying the existence of a conflict. (District Brief, p. 12). No analysis or discussion accompanies this statement.

With regard to the question of whether the Corps' actions were consistent with the expressed intent of Congress in authorizing the project, the District merely states that "it was not necessary for the court of appeals [and hence this Court] to consider the intent of Congress in passing the Flood Control Act of 1965" due to the revocation of the permits. (District Brief, p. 8). Because Congress did not intend for the Corps to use permit powers, the question whether the permits would have been properly revoked if such authorization were present (the issue the Fifth Circuit chose to address) is the irrelevant issue in this case. Both the District's argument and the Fifth Circuit's opinion are predicated upon an assumption that the Corps' use of permit powers was authorized by and consistent with the statutory requirement that the Local Sponsor should make the required relocations and obtain the necessary

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[10] **Title II (entitled "FLOOD CONTROL") § 204 of the Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (Oct. 27, 1965),** provides with reference to the Taylors Bayou project, that:

> The project for flood protection on Taylors Bayou, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers, as modified by the Secretary of the Army, in House Document Numbered 206, Eighty Ninth Congress, of an estimated cost of $5,004,000.

property for the project. If there are any "baseless" or "unsupportable" assumptions underlying the arguments presently before this Court, this is surely one of them. There is no basis for the use of permit powers to accomplish acquisition of property and relocation of pipelines in a manner contrary to the express will of Congress in approving a local protection project.

In its discussion of *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987), the District argues that "UTTCO had no . . . property interest" taken for public use. In so arguing, it ignores the conclusion by the Fifth Circuit – acknowledged by the Federal Respondent – that "the Corps' revocation orders would result in a taking of [UTTCO's] property interests in pipeline located in substantial areas outside of the permitted area". (Federal Brief, p. 7, n.5). It is simply ludicrous to suggest that UTTCO's rights in fast lands do not represent valuable property rights protected against uncompensated taking. As this Court has observed, none of its decisions "have ever doubted that when the Government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to *condemn* and pay fair value for that interest." *Kaiser Aetna*, 444 U.S. 164, 177, 100 S.Ct. 383, 391 (emphasis added). With respect to UTTCO's rights in fast lands, the Fifth Circuit properly observed that UTTCO's rights were the same as "any farmer whose property is burdened by UTTCO's easement and lies in the way of the widening project" and that these rights constitute "private property". (App. 31-2). Just as the Corps has no right to take farm land by resort to its "permit powers", it had no right to take UTTCO's property. It was required to condemn such property. *Id.*

CONCLUSION

United Texas Transmission Co. respectfully requests that its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully Submitted,

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